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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JON TOM STATON,
Petitioner,

v.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 of MUSKOGEE COUNTY, OKLAHOMA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS FOR REVIEW

I. The disposition of the First Amendment issue without a hearing is contrary to the decisions of this Court and is in conflict with the law of other circuits.

II. The denial of a hearing on the liberty issue is contrary to the decisions of this Court.

III. The lower court requirement that the plaintiff have the burden to come forward with evidence to establish lack of cause for dismissal is contrary to the controlling decision of this court and is a departure from usual judicial proceedings.

IV. The failure of the lower court to require the defendant school board to find the facts after the administrative hearing is in conflict with the decisions of this Court.

V. The lower court rulings on the merits of the issue of cause for dismissal and the First Amendment issue are clearly erroneous pursuant to the decisions of this court.

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OPINIONS BELOW

The first trial resulted in the slip opinion of *Staton v. Mayes*, No. 73-112-C, Eastern District of Oklahoma, March 31, 1975, and found herein at page 47a of the Appendix (App 47a). The appeal of that is reported in 552 F2d 908 (10 Cir 1977), *cert denied*, 434 US 907 (1977). App 25a. The second trial was recorded in the slip opinion of the consolidated cases, 73-112-C and 77-186-C, Eastern District of Oklahoma, March 16, 1981. App 11a. The final related opinion is the slip opinion No. 81-1491 (10 Cir 1984). App 1a.

JURISDICTIONAL STATEMENT

The judgment of the Tenth Circuit Court sought to be reviewed was filed April 26, 1984. A timely petition for rehearing was ruled upon, entered and filed on October 7, 1986. App 61a. The jurisdiction of this Court arises from 28 USC § 1254.

STATUTORY PROVISION INVOLVED

The statute which the case involves is 42 USC § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The board of education of defendant school district employed the plaintiff (Staton) as superintendent of schools in 1967. The school district had resisted school desegregation and was one of the last in Oklahoma to maintain separate schools for black students. The board of education employed plaintiff with the express intention of accomplishing desegregation of the schools along with initiating a program of teacher evaluation and bringing about the annexation of adjacent small school districts.

The annexation was accomplished in the first year Staton was superintendent. There was understandably some turmoil when the small districts lost their identity

and their taxes increased. The initiation of the program of teacher evaluation was accompanied, as it has been historically across the nation, with some resistance. The announcement of the plan of desegregation in the fall of 1969 was accompanied by turmoil manifested by opposition to busing of children.

The board of education became split for the first time in the spring of 1970 when one of the three individual defendants (Moore) was elected to the school board upon a platform of anti-busing. At the first regular board meeting after his election, Moore sought the termination of the employment of Staton who had promulgated the plan of desegregation. The other four members of the board responded by vacating the plan of desegregation and naming Moore to direct the development of a new plan. The Department of Health Education and Welfare responded by threatening to withdraw federal funds.

The threat of the loss of federal funds prompted the board to notify a large group of teachers that their contracts would not be renewed. The teaching staff went out on strike to coerce the majority of four members of the board to reinstate the desegregation plan.

Turmoil from the controversy resulted in the involvement of various state agencies. The desegregation plan developed by Moore was rejected by the Department of Health Education and Welfare. The original plan which had been developed by Staton at the direction of the school board was reinstated.

The controversy and the split on the school board continued and over the ensuing three years the other two defendants, Wade and Mayes were elected and joined Moore to become the majority on the five member board. Mayes was the third member elected and pledged in his campaign to join Moore and Wade to terminate Staton if elected. Within minutes after Mayes took the oath of office, the three defendants voted to terminate Staton immediately which was mid-contract and mid-school year.

At the time of the dismissal of Staton, 70 Oklahoma Statutes § 6-103 required the school board to grant a hearing of such a dismissal and stated in part, "[P]rovided in cases involving incompetency or neglect of duty, the decision arrived at a said hearing shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county." Suffice to say, Staton was charged with neglect of duty and incompetency. A farcical hearing was held, and it is a part of the record due to the fact that Staton hired a federal court reporter for the hearing.

Staton filed a 42 USC § 1983 case claiming jurisdiction pursuant to 28 USC § 1343 in federal district court. Along with procedural complaints, he alleged that there was no evidence to support the charges and that he was dismissed because it fell his lot to perform unpopular duties which he did exactly as directed by the original members of the board who were the controlling majority until the day he was fired.

The trial court rejected the trial of all substantive issues at pre-trial and explained at trial that it was "not his office" to say whether Staton was guilty as charged or not. The court stated in the opinion that he was not concerned with the discretionary decision of the board that plaintiff was guilty as charged. App 51a.

The parties stipulated that the transcript of the hearing before the board would be made a part of the record. After expressly limiting the trial to the procedural issues, the trial court nevertheless found in the opinion that he could see evidence in the record of the board hearing "which could" amount to support of the charges. App 52a.

Staton appealed and along with procedural matters argued that there was no evidence to support the charges. The brief on appeal emphasized that the dismissal infringed upon his First Amendment right of free speech

to plan and speak out in the community in the performance of his duties as directed by the board. Particular emphasis was given to the right to be protected from the whiplash arising from racial *animus* in opposition to a board directed plan of school desegregation.

The circuit court found a property interest arising from the contract of Staton and a liberty interest in the stigma proven at trial to arise from the charges. App 29a. The court found that the board was a prejudiced tribunal due to their public pledge, prior to the hearing, to dismiss plaintiff. App 35a. The court specifically held that the defendants must state reasons to terminate Staton to protect from a decision based on *ex parte* evidence. The remand mandate gave the school board the option to find the facts if they sought to prove that the dismissal was proper in order to facilitate any further proceedings of appeal of the cause for dismissal prior to consideration of proper relief. App 39a.

Upon remand the trial court subsequently issued an order to the school board stating, "Should the school board determine that Plaintiff's removal is warranted and enter a new removal decision, said decision must state the reasons for this determination and the evidentiary basis relied on by the school board in reaching its decision." App 46a. As the trial court reported in the Memorandum Opinion after the next trial, the board of education refused to pursue the issue of proper removal. App 12a.

During the period that the case was on appeal, plaintiff had filed a second complaint alleging with special particularity the First Amendment claim. The trial court consolidated the cases for trial.

The trial court again insisted that only procedural matters would be considered and limited the trial to relief from the two procedural deprivations found by the circuit. Staton objected to the denial to hear the First Amendment claim and refused to allow his counsel to

sign a pre-trial order omitting the issue. Counsel withdrew from the case over the controversy, and the trial court issued an order which denied attorney fees for the six years counsel had served Staton.

Prior to the hearing on damages, the school board stipulated that they owed Staton for the remainder of the term of his contract. The school board listed no witnesses and called none at trial.

Staton called the three individual defendants, who were no longer on the board, as witnesses in an attempt to prove their lack of good faith in the dismissal. It was the argument of Staton that their qualified immunity would be removed by proving that they "knew or should have known" that he should not have been fired for his association with the original board by following their directions and for reasons arising from racial *animus* for Staton developing, speaking out for and implementing the plan of desegregation.

Defendant Mayes testified that he had made his decision to vote to dismiss plaintiff upon *ex parte* evidence that he obtained from talking to parents, teachers, and businessmen on the street. He stated his reasons to dismiss as turmoil in the school system, low teacher morale, students not getting a good education and a bond issue had failed. He further testified that he knew of no acts or omissions of Staton to cause the problems. Wade testified that he could not remember any reason for his vote to dismiss Staton. Moore was the only one of the three defendants who voted to terminate Staton who remembered an act or omission of Staton that prompted his decision. He testified that Staton went out of town during a teacher strike as reason for his decision. It is noteworthy that Moore then admitted that the other four of the five board members had taken Staton with them out of town to a business meeting. All three defendants testified that they could remember no other act or omission of Staton to support the dismissal.

Counsel then attempted to prompt the testimony from Moore on racial *animus* as a motivating factor in the dismissal. The trial court halted the proceedings to remind counsel that testimony related to the First Amendment cause was barred at pre-trial. The trial court went on to explain that the circuit has reversed only on the basis of procedural matters and that neither he nor the lawyers could enlarge the hearing to include substantive matters.

The trial court held that the defendant school district was liable upon the stipulation of fact for the unexpired portion of the contract of Staton. The court further held that "Plaintiff must prove that the denial of Plaintiff's right to due process caused the injuries complained of." App 20a. Surprisingly, after the denial of trial of substantive issues, the court found that "no evidence has been presented to the Court to indicate that its previous findings of fact are erroneous in any manner." App 13a. The court also adopted the conclusory allegations of Mayes and Moore set out *supra* to hold that Staton was fired for cause and not entitled to further relief.

The circuit court then seemingly reversed their first mandate that the defendant board had to find the facts prior to pursuit of the question of cause for dismissal. The trial court was affirmed as to the finding of cause for dismissal. The circuit court ignored the fact that the trial court denied trial of the First Amendment cause and then the circuit ruled on the merits of the cause by holding that the substance of the alleged reasons for dismissal did not constitute matters of public concern.

Staton petitioned for rehearing pleading that the hearing to the trial court had been limited to procedural matters and damages, and that cause for dismissal was both waived by the defendant school board and barred from the trial by the court. Counsel for the individual defendants, who had previously represented the school board, presented an affidavit in support of the rehearing petition stating that the board had informed the trial

court that witnesses and evidence would not be presented at trial to show cause for dismissal. The current counsel for the school board responded to the petition for rehearing and agreed that cause for dismissal was not heard. Two and one half years after the petition for rehearing was filed, the circuit denied it without an opinion. App 61a.

ARGUMENT

I. FIRST AMENDMENT ISSUE

The trial court limited the first trial to procedural due process issues and dismissed the case. The circuit court reversed on procedural grounds, ignored the First Amendment cause and granted the defendant school board opportunity to find the facts to facilitate a hearing of the merits. Pending the appeal and while the trial court had no jurisdiction of the initial case, Staton filed a second case in which the First Amendment cause was pled with extensive particularity. The cases were consolidated for trial after remand of the initial case.

The trial court again limited the hearing to procedural matters at pre-trial and rejected evidence being offered on the First Amendment issue at trial when an attempt was made to introduce evidence on the merits of the First Amendment claim by stating:

> The constitutional deprivations are because he was tried by an unbiased tribunal, and the tribunal that tried him failed to file written findings and conclusions. You must not expand on what the Circuit has determined to be the deprivation, constitutional deprivations present in this case. You're not entitled nor am I entitled to.

In spite of the trial court denial of hearing the First Amendment issue, the circuit court ruled on the merits of the cause. The circuit decided that the element of public concern required to make a *prima facie* case was not established. App 6a (Footnote 2).

This Court has set out the appropriate procedure to test a First Amendment claim in *Mt. Healthy City School District v. Doyle*, 429 US 274 (1977). We find another circuit case which made the same error initially that we claim has been made by the circuit in the instant case. The court there corrected their opinion due to the supervening authority arising from the *Mt. Healthy* decision and upon rehearing adopted the rationale of the dissenting judge in the initial opinion. *Stewart v. Bailey*, 556 F2d 281, reversed on rehearing, 561 F2d 1195 (5 Cir 1977).

> The district court failed to adjudicate the first amendment claim, apparently believing that a procedural impeccable firing could not possibly violate the first amendment. That view is obviously wrong. I would reverse.
>
> Taking a different tack from the trial court, the majority rejects the first amendment claim upon finding insufficient evidence that Stewart's firing was based on the exercise of protected rights. The lack of evidence is hardly surprising; the district court refused to hear any evidence on the issue. This refusal to hear first amendment evidence was tantamount to a holding that the complaint failed to state a first amendment claim.

Id., 556 F2d 287. Staton's complaint set out with detailed particularity the public concern element of the First Amendment claim. The denial of the claim without opportunity for hearing the evidence as set out in *Mt. Healthy* is error.

II. LIBERTY ISSUE

The circuit court held upon the first appeal that Staton had a liberty right at issue and made the specific finding that the charges stigmatized the opportunity for further employment. App 29a. This Court has held that once the liberty right is found, the burden is placed on the

defendant to provide a hearing before the body which raised the charges. *Board of Regents v. Roth*, 408 US 564, 573 (1972).

> In such a case, due process would accord an opportunity to refute the charge before University officials.

The twelfth footnote of the case states,

> The purpose of such notice and hearing is to provide the person an opportunity to clear his name.

The remand of the circuit court gave the defendant school board opportunity to find the facts if they wanted to pursue the dismissal and to allow the case to proceed through state administrative appeal procedures. App 39a. The trial court ordered the school board to respond to the mandate. App 45a. The defendant school board not only refused to find the facts, their response, which is a part of the record, informed the court that the necessary evidence and witnesses were not available and they did not wish to try the merits of the charges.

This Court has held that such a denial is a deprivation of due process in *Owen v. City of Independence*, 445 US 622 (1980). The last two sentences of footnote thirteen of *Owen* state,

> Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

Another circuit cited *Owen* and *Roth* as authority that a state declaratory judgment procedure was adequate to protect a property interest but the liberty interest demanded the hearing before the administrative officials. *Limerick v. Greenwald*, 666 F2d 733 (1 Cir 1981).

Both the *Roth* and *Owen* cases emphasize the need for the charging officials to conduct the hearing. The *post hoc* finding of the lower courts that a *sub silentio* hearing of cause took place before the trial court and Staton should have proven the lack of just cause is incongruous. Even if the trial court had allowed the hearing on cause, Staton was denied notice of what evidence to present when the defendant school board refused to find the facts to support the charges. Staton was denied the notice and hearing required for opportunity to clear his name.

III. BURDEN TO COME FORWARD

Through the pre-trials and hearings on both occasions, the trial court ruled that the trial was limited to procedural issues. The court expressly gave the rationale for not allowing a hearing of cause for dismissal. App 51a.

> 42 U.S.C. § 1983 does not extend the right to relitigate in Federal Courts evidentiary questions arising in school proceedings and was not intended to be a vehicle for Federal Court correction of errors in the exercise of school officials' discretion that do not rise to the level of violations of specific constitutional guarantees. Hence, under this case and the issues presented herein, this Court will not be concerned with reference to the wisdom or merits of the discretionary decision of a majority of the Board that Plaintiff was guilty as charged and should be dismissed.

The trial court reasoned during the second trial that only the procedural issues found by the circuit court on the first appeal could be at issue. When counsel attempted to prove bad faith on the part of the individual defendants by showing that conflict between the two factions on the board was the source of the difficulties, the court halted the hearing to explain that he would not allow trial of the issue. The trial court subsequently abandoned his limitation by affirming the fact finding in

the first opinion that the transcript of the hearing before the school board contained evidence that "could" support the charges and that the evidence of various problems existing in the schools was attributable to the actions or omissions of Staton. App 21a.

The trial court cited *Carey v. Piphus*, 435 US 247 (1978) as authority that plaintiff must prove that the denial of due process caused the damages. App 20a. The circuit ignored the fact that the trial court had denied the presentation of substantive issues and held that since *Carey* was briefed and argued to the trial court as the applicable law by Staton's counsel, the parties had opportunity to develop evidence on the issue and the trial court properly considered the discharge was justified. App 9a.

This Court in *Carey* expressly approved a circuit holding that once the plaintiff showed the procedural violation, the defendant had the burden to come forward and prove that the decision on the merits of the charges was justified. The defendant school board never found the facts upon which notice could be based to hear cause for dismissal. They virtually stipulated that there was no cause for dismissal when they agreed that they owed Staton for the rest of his contract. They had informed the trial court, and it is a part of the record, that they would not and could not marshal the evidence and witnesses and called none at trial.

It is incongruous that the circuit court could find that under these conditions Staton was "aware that the damages issue to be tried included the *Carey* justification theory" and that the "parties had opportunity to develop evidence on the issue." App 9a. Defendant school board had the burden not only to find the facts but to come forward with the evidence to show cause for dismissal under the teaching of *Carey*. This burden shifting is also the rule set out in *Owen* and *Mt. Healthy, supra.*

Staton was aware that the case was controlled by the *Carey* justification theory. When the school board refused to find the facts, refused to hear cause and informed the trial court that they would not produce witnesses and evidence to contest the issue at trial, proof of cause for dismissal was waived. *Carey* does not reverse the rule that when a protected interest is proven, the burden shifts to the defendant to show cause. It was error to place the burden to prove lack of cause on Staton.

IV. FINDING OF FACTS

Staton paid for the reporting and transcription of the hearing before the board of education to preserve proof that there were no facts to support the charges of neglect of duty and incompetence. The transcript is void of such supporting facts. No tribunal or individual has since found a fact and there are none in the transcript to support the charges.

Counsel called each of the three individual former board members who voted to dismiss Staton as witnesses at trial and repeatedly asked them to state the acts or omissions of Staton that supported the charges. The sole act that was produced was the statement that Staton went out of town during a teacher strike that transpired three years prior to the dismissal. The witness then admitted that the other four school board members took Staton out of town to a business meeting. Each of the three defendants then specifically testified that they could remember no other act or omission of Staton to support the charges.

Defendant Mayes, who came on the board the night Staton was fired, testified at both trials that he based his decision to terminate Staton on "conversation with educators and businessmen and just parents." This Court was cited in the first opinion from the circuit as authority for the rule that a fact finding was necessary to guard

against a decision based on just such *ex parte* evidence citing *Goldberg v. Kelly*, 397 US 254 (1970). App 39a. The circuit then apparently reversed itself by approving the *sub silentio* hearing of the cause for dismissal before the trial court although the school board had refused to find the facts of cause as the due process prerequisite to trial.

Defendant school board claims that the requirement of finding the facts was made moot by their stipulation that they would pay Staton for the breach of contract. The same substance constituting proof of cause in contract is also the crux of the liberty right. Staton could not come forward with evidence without notice of what to defend.

After Mayes testified that he had never met Staton before the night he came on the school board and voted to fire him, and after he testified that his decision was based upon *ex parte* evidence he obtained from the public, he listed general school problems as reason for voting for the dismissal. The trial court adopted this testimony of problems in the school district arising from teacher evaluation, financial problems, the teacher strike and problems in implementing a desegregation plan. The circuit court affirmed on the same basis even though Mayes and the other two defendants testified that they could remember no act or omission of Staton that contributed to the problems.

The circuit court held in the first opinion that the "decisionmaker should state the reasons for the determination and the evidentiary basis relied on," and went on to hold "these fundamental elements were lacking here, and this has compounded the difficulty of the case." App 39a. Upon remand the defendant school board still refused to find the facts and responded to the court that a new trial of cause was being rejected by the board "because of absence of witnesses, difficulty in recalling former events, change in membership of the Board and no desire to engage in further community discord."

Three years later the case came on for hearing on the damages and the trial and circuit court held that the *Carey* decision of this court was sufficient to put Staton on notice that cause for dismissal would be tried, and further, *Carey* placed the burden of proof of lack of cause for dismissal on Staton. This burden was incongruously placed on Staton after the circuit finding that the case was complicated due to the lack of fact finding, after the board still refused to find the facts, and three years after the board stated that they could not produce witnesses and evidence to prove cause for the dismissal.

This Court and the other circuits have identified two deprivations of due process that arise from these facts. First, the "meaningful time and manner" for the hearing as set out in *Mathews v. Eldridge*, 424 US 319, 333 (1976) was denied. The eighth circuit found a two year delay in a school case devastating. *Brown v. Bathke*, 566 F2d 588 (8 Cir 1977). The alleged trial of cause herein was eight years after the dismissal and three years after the defendant school board stated they could not produce witnesses or evidence to prove cause. It is incongruous that the lower courts could charge Staton with the burden to refute the charges after the board refused to find the facts and informed the court that they could not produce the witnesses and evidence to support the charges.

Second, this Court has carefully taught that a fact finding by the administrative tribunal is a fundamental precedent to trial of cause. *Morgan v. United States*, 304 U.S. 1 (1937)

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

Another circuit has held in a school case that the "detailed evidence relied upon by the Board is essential" to "demonstrate possible erroneous assumptions" and "offer pertinent contrary evidence." *Newman v. Bd. of Ed. of City Sch. Dist. of N.Y.*, 594 F2d 299 (2 Cir 1979).

The circuit court held that Staton should have disregarded the stipulation of the school board that they breached his contract, disregarded their pleading to the court that they would not try cause, disregarded the pretrial and trial pronouncements of the court that the trial was limited to procedural matters and in some way come forward with proof of lack of cause over the denials of the court to try the issue. If one conceded that such an incongruous burden was proper, due process demands that the school board find the facts to provide Staton with notice to prepare for trial.

V. CLEARLY ERRONEOUS STANDARD

If racial desegregation, academic achievement and taxes were of public concern, the decision on the First Amendment issue is clearly erroneous. Unless the school superintendent is charged with the duty of desegregating the schools, evaluation of teachers and raising taxes of patrons without resistance, the decision on the merits of the dismissal is clearly erroneous. The simple test is whether the court upon consideration of the evidence is convinced that a mistake has been made. *United States v. United States Gypsum*, 333 US 364 (1947).

The transcripts of both trials to the court and the school board hearing are part of the record. Former board members testified at the administrative hearing and before the court that there were three long standing and difficult problems of the school district that were given to Staton upon his employment in the school district. They testified that the three problems were racial desegregation, teacher evaluation arising from a concern

of low achievement by the children and a financial problem arising from a need to annex the adjoining school districts that sent children to the defendant district high school but were not included in the tax base. The testimony revealed that Staton soon solved the annexation problem, which several preceding superintendents had failed to accomplish, but that it raised the enmity of the newly acquired patrons whose taxes were increased. The evidence established that a teacher evaluation program was initiated and that the achievement scores of the students had risen during the tenure of Staton, but that there had been resistance on the part of the professional staff to evaluation. School desegregation was soon accomplished after a fifteen year resistance by the defendant school district to the mandate of this Court on the issue. The evidence showed that the Department of Health, Education and Welfare recognized the plan of desegregation, promulgated by Staton, as a model plan for similarly situated schools in the nation. However, it was greeted with great resistance in the community.

The first of the three individual defendants who was elected to the board, Moore, testified that he ran on the platform of opposition to the plan of desegregation. He immediately moved for the removal of Staton who had promulgated the plan. The school board set aside the plan and gave Moore the task of devising a better one. The federal government threatened withdrawal of federal aid. The teachers struck and demanded reinstatement of the old plan.

This division on the board never healed. An assistant superintendent testified at the administrative hearing, that tax payers disgruntled with annexation, that teachers who resisted evaluation and all members of the community who opposed desegregation joined to oppose the old board majority and to remove Staton as superintendent of schools.

The trial court refused to allow evidence of the public concern, although it was thoroughly alleged in the Complaint, and refused to hear the First Amendment issue. The circuit surprised by ruling on the merits of the cause by claiming that plaintiff did not make a showing of public concern in relation to the alleged protected activity. App 6a (Footnote 2).

Another circuit has rationalized that a school administrator speaking out on school issues while being directed by one element of a divided board raises the rule that a "teacher's right of freedom of association is closely akin to freedom of speech." The court cited *Shelton v. Tucker*, 364 US 479 (1960) as authority for the principle. *Burris v. Willis Ind Sch Dist*, 713 F2d 1087, 1094, (5 Cir 1983). That case found a "political issue" meeting the public concern test arising out of the administrator and the older element on the divided board taking the use of school trucks from argiculture teachers upon the grounds that the privilege had been abused. That finding stands in stark contrast to the rationale of the Staton case.

It is not incongruous but rather incredible that the circuit court found that the school district annexation and resultant taxation, the teacher evaluation program related to achievement and the long resisted political issue of racial desegregation were not of public concern. Even though the trial court denied the full development of the statewide concern alleged in the complaint, this issue is conclusive in the collateral evidence. The circuit opinion further found "turmoil" due to these problems as evidence to support the dismissal of Staton but then denied its existence by finding no public concern arising from the same community problems. App 6a-7a (Footnote 2).

A reasonable mind could not differ. The entire evidence reveals that an unquestionable mistake has been made and the decision is clearly erroneous. It is an abuse of discretion to deny judicially what is known otherwise

as a person. Student achievement, taxes and racial desegregation are issues of public concern.

The sole act in evidence in the entire record that is in evidence to support neglect of duty or incompetence is the allegation that Staton was derelict in allowing four of the five school board members to escort him out of town to a business meeting during the teacher strike. The rest of the findings by the lower courts arise from the general problems of finance, achievement and school desegregation to which solely defendant Mayes testified. He admitted he met Staton the night of the dismissal and that his decision was based on conversation with "educators, businessmen and just parents." He added that "I felt that the Superintendent had the overall responsibility of administering the school district policies and seeing that this—a good education was offered to our children." He could not relate any act or omission of Staton to the problems. Wade specifically testified that he could remember no acts or omissions of Staton to support the charges. Moore testified that he could remember no reason other than the fact that Staton went out of town during a teacher strike three years prior to the dismissal.

Even if the court had allowed trial of cause for dismissal and the defendant school district had found the facts to which the individual defendants testified as the reason for dismissal, Staton would have had nothing to defend. None of the defendants, although repeatedly asked by counsel, could relate a single act or omission of Staton to support the charges. The problems identified were what Staton was employed to solve. All related testimony was that the problems were either entirely solved or at least improved. There is no evidence to the contrary. The conviction that a mistake was made in fact finding should have arisen from the circuit court review under the clearly erroneous rule of this court.

CONCLUSION

Staton was wrongfully denied trial of the liberty and First Amendment issues. Absent a statement by defendants of the facts supporting cause for dismissal, the burden was wrongfully placed on Staton to show lack of cause. The decision on cause for dismissal and the finding of lack of public concern are each clearly erroneous. It is the precise purpose of the First Amendment to protect one who competently performs his duty on unpopular issues. Proof of cause would at least require a showing of acts or omissions of Staton that prompted the community discord.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1491
(D.C. Nos. 73-112-C and
77-186-C, E.D. Okla.)

JON TOM STATON,
Plaintiff-Appellant,
v.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,
Defendants-Appellees.

[Filed Apr. 26, 1984]

ORDER AND JUDGMENT

Before HOLLOWAY and DOYLE, Circuit Judges, and BROWN, District Judge *

The factual background of this civil rights appeal is set forth in *Staton v. Mayes*, 552 F.2d 908 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977). In that case Staton, a former school superintendent who had been discharged on charges of willful neglect of duty and incompetence,

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* The Honorable Wesley E. Brown, United States District Judge of the District of Kansas, sitting by designation.

brought a civil rights suit against a school district and the school board members who voted to discharge him, challenging the dismissal as a denial of due process. We held that Staton had a property interest in his employment contract which had 1 5/12 years to run when he was discharged, and that Staton had suffered a deprivation of liberty by the public nature of the charges against him. We reversed the dismissal of Staton's civil rights claim by the federal district court. We held the discharge invalid on the ground of violation of procedural due process due to a biased tribunal, and due to the failure of the Board to make any statement of reasons for the discharge and the evidentiary basis relied on. We vacated the judgment of the district court and remanded with directions to expunge the former determination on the charges and to permit the Board to consider, "if it wishes, making a new finding on the charges to determine whether the earlier removal on them was proper." *Id.* at 916.

This § 1983 action stems from the Board's refusal to conduct new hearings and its decision not to offer Staton a new contract. Staton seeks over $920,000 in damages,[1] for loss of earnings ($32,291.61 for the unexpired portion of his employment contract and $480,708.38 for damage to his earning power), loss of experience and professional growth ($100,000), pain and suffering from harassment ($100,000), expenses of seeking other employment, court costs and attorneys' fees ($60,000), punitive damages ($25,000), loss of participation in the retirement program ($25,000), and loss of liberty to practice his chosen profession ($100,000).

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[1] This figure represents the amount of damages sought as set out in the pretrial order. II R. 308. Staton in his brief argues that additional damages are appropriate in light of the evidence and the amount requested in his supplemental pretrial brief. Brief of Appellant at 24.

After a nonjury trial, the district court entered an order citing our earlier opinion in concluding that Staton's rights to procedural due process were violated; the court focused on the liability of the defendants for the violations and the damages to be awarded to Staton. Liability was admitted for the $32,291.61 unpaid balance on the unexpired term of Staton's contract by the school district and by the individual defendants in their official capacities. The court therefore held the defendant school district and the individual defendants acting in their official capacities as school board members liable for the unpaid balance on his contract. The court found that the board members in their individual capacities enjoyed a qualified immunity because they acted without malice in discharging Staton, and neither knew nor reasonably should have known that their actions would violate Staton's constitutional rights.

The court awarded Staton damages for the amount due on his employment contract as well as costs and attorneys' fees. The court concluded that Staton "fully carried out his duty to mitigate his damages during the unexpired term of his employment contracts and is therefore entitled to $32,291.61 as the unpaid balance therefore." II R. 381.

The court held that Staton was not entitled to the additional damages sought. The court observed that punitive damages were inappropriate because there was no evidence of "aggravating circumstances," such as " 'reckless indifference to the property rights of others, ill will, a desire to injure or malice.' " *Id.* (quoting *Silver v. Cormier*, 529 F.2d 161, 163 10th Cir. 1976)). The court concluded that

> The remaining items of damages [Staton] seeks (*i.e.* damage to earning power, loss of experience and professional growth, pain and suffering from harassment, expense in seeking other employment, loss of

> participation in retirement program and loss of liberty to practice chosen profession) *are direct consequences of Defendants' justified dismissal of* [*Staton*] and thus are not recoverable by [*Staton*], . . . [These damages are not the] consequences of the Defendants' violation of [Staton's] right to procedural due process of law by failing to provide [Staton] with an unbiased tribunal and a statement of the reasons and the evidence relied on for his termination.

II R. 381-82 (emphasis added). We turn to Staton's arguments on appeal.

First, in connection with the rulings of the district court on the liability of the defendants for the additional damages in their official capacities, Staton argues on appeal that the district court should not have addressed the underlying cause of his dismissal in ruling on the damage claims. Staton contends that our prior decision in this case required that the Board conduct a hearing on the cause of the dismissal before there could be any consideration in these court proceedings of any justification for the discharge of plaintiff. He argues that it was error to reenter the findings and conclusions favorable to the defendants which were made in the earlier district court case concerning the discharge.

The Supreme Court has held that a plaintiff in a § 1983 action of this type must prove that the damages alleged were caused by the procedural due process deficiencies, and not by a justified deprivation:

> In this case, the Court of Appeals said that if petitioners can prove on remand that "[respondents] would have suspended even if a proper hearing had been held," then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due

> process could not properly be viewed as the cause of the suspensions. The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. We do not understand the parties to disagree with this conclusion. Nor do we.
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> * * * *
>
> Moreover, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. But as the Court of Appeals held, the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983. This ambiguity in causation, which is absent in the case of defamation *per se*, provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.

Carey v. Piphus, 435 U.S. 247, 260, 263 (1978) (citations and footnotes omitted); *see also McGhee v. Draper*, 639 F.2d 639, 644-45 (10th Cir. 1981).

We cannot agree that the district court erred in considering whether the discharge was justified in light of the *Carey* rule on damages in a procedural due process case. Here, as noted, the Board decided not to conduct any further removal proceedings. This left the parties without any administrative determination on the correctness of Staton's discharge. The claim for damages for violations of procedural due process, however, did not become moot or unenforceable. The district court was required to dispose of the damage claims under principles laid down by the Supreme Court and from other decisions. Under the *Carey* test, the district court found that the evidence adduced at the court trial showed justification

for the Board's decision. We cannot say that the court's findings on justification and damages are clearly erroneous. Thus we must hold that the district judge's finding that damages suffered by Staton were caused by a justified discharge, rather than by the procedural due process violations, is not clearly erroneous. In terms of *Carey*, in these circumstances we cannot say that the district court erred in concluding that an award of damages would constitute a windfall, rather than compensation, because the failure to accord procedural due process could not properly be viewed as the cause of Staton's discharge. 435 U.S. at 260.

Staton takes issue with the district court's ruling that his discharge for incompetence and willful neglect of duty finds support in record evidence of problems Staton encountered with respect to a teacher evaluation plan, a teachers' strike, and implementation of a school desegregation plan.[2] Brief of Appellant at 9-20.

We conclude that there is adequate support in the record of the trial on damages for the district court's findings, comprising among other things the testimony of twelve witnesses, including Staton and the individual defendants. *See, e.g., Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545, 547 (8th Cir. 1983) (per curiam) (§ 1983 plaintiff only entitled to nominal damages under *Carey v. Piphus* if allegedly stigmatizing information leading to discharge is true); *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 728-32 (5th Cir. 1982)

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[2] Staton maintains at various points in his brief that his discharge somehow implicated his First Amendment rights concerning his implementation of the desegregation plan. He also argues that the district court failed to make required findings in connection with his First Amendment claim. We have examined the record in detail and conclude that Staton has failed to meet his burden of proving the existence of any constitutionally protected conduct that was a motivating factor in the Board's decisions to discharge and not rehire him. *Cf. Connick v. Myers*, —— U.S. ——, 51 U.S.L.W.

(affirmed jury verdict for mental anguish and emotional distress caused by deprivation of procedural due process for doctor whose discharge was substantially justified; back pay not justified where hospital proved that discharge would have occurred absent procedural defects); *Kendall v. Board of Education*, 627 F.2d 1, 6 (6th Cir. 1980) (remand to district court to consider whether discharged teacher could prove "any actual injury, such as lost employment opportunities or mental anguish, which was directly caused by the denial of procedural due process;" district court must make findings on whether or not school board "met its burden of proving that [plaintiff] would have been dismissed even if a proper hearing had been conducted."); *Roane v. Callisburg Independent*

4436, 4440 (U.S. April 20, 1983) (discharge of assistant district attorney did not not violate First Amendment where speech "touched upon matters of public concern in only a most limited sense . . . [and was] most accurately characterized as an employee grievance concerning internal office policy"); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Wilson v. City of Littleton*, —— F.2d ——, No. 83-1250 (10th Cir. Apr. 16, 1984) (discussing public concern requirement in *Pickering* and *Connick*).

There was conflicting evidence on whether Staton was performing his duties. A former Board member from 1963 to 1973, Mr. Sadler, testified that the Board's attention was not directed to any duties Staton was failing to perform and that he was carrying out the job the Board asked him to do. VI R. 67-68. Similar testimony favorable to Staton was given by Dr. Mathews, a Board member, *id.* at 78, and by Mrs. Chandler, another Board member. *Id.* at 85. Staton testified that Board members Moore and Wade never told him that he was performing his duties in an inept or incompetent manner. *Id.* at 135-36. On the other hand, Mayes testified concerning the school system being in turmoil, that children were not getting a good education, that teacher morale was low, and that bond issues had been rejected. *Id.* at 40, 47. There was other testimony on problems connected with Staton's performance of his duties. *See id.* at 8, 15-16 (testimony of defendant Moore on Staton's leaving town after strike vote by teachers).

School District, 511 F.2d 633, 639 (5th Cir. 1975) (district court conclusion that school board lacked good cause in discharge of school superintendent not clearly erroneous).[3]

We note that the Staton argues that the second trial should not have dealt with the justification for the discharge. He contends that he had no way to predict that the trial court would deem the merits of the discharge open for litigation; that the pretrial order—not approved by Staton's counsel—did not mention the issue touching on the merits of the discharge; and that he consequently failed to get evidence in the record on waiver of the issue by the defendants. Reply Brief of Appellant at 1-2.

The pretrial order reflected the defendants' admission of liability for $32,291.62, the unexpired portion of the contract, and their denial of all other liability for damages. The pretrial order directed, among other things, the filing of a brief by Staton on damages and that it discuss "[d]amages including amounts claimed on contract balance, reduced future earnings, harassment, loss of

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[3] In addition, Staton's claim for damages accruing after the expiration of his employment contracts must be viewed in the context of his alleged property interest in reappointment as superintendent of schools. We held in our earlier opinion that Staton had a property interest by virtue of his employment contracts which had 1 5/12 years to run when he was discharged. 552 F.2d at 911. He has no property interest beyond the expiration date of his contracts because a school superintendent does not enjoy tenure under Oklahoma law. *Board of Education v. Morris*, 656 P.2d 258, 261 (Okla. 1983) ("We hold that it was never the intention of the legislature to afford tenure to superintendents."); *see also Patterson v. Ramsey*, 552 F.2d 117, 118 (per curiam) (4th Cir. 1977) (discharged school superintendent "had no tenure and therefore no property interest in his job"). Moreover, Staton does not allege that a "de facto tenure" system gave him a "legitimate claim of entitlement" to reappointment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 600 (1972); *see also Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1501-04 (10th Cir. 1984).

professional growth, and loss of retirement program." *Carey* was discussed in a subsequent brief of Staton in support of a motion for summary judgment, II R. 330-31, and by defendants, II R. 314 (Response to Plaintiff's Supplemental Pretrial Brief); this brief by defendants argues that *Carey* supports the proposition that damages on a procedural due process claim would be a windfall instead of compensation if school officials proved that their same action would have occurred if a proper hearing had been held. Finally, Staton's attorney in closing argument stated that *Carey* was the "applicable law" on the issue of damages. VI R. 310.

Thus we are satisfied that the parties were aware that the damages issue to be tried included the *Carey* justification theory and the parties had an opportunity to develop evidence on the issue. The issue was tried and under *Carey* we feel the trial court properly considered whether the discharge was justified in connection with the damage claims still in question. And since we cannot say the court's findings on the issue were clearly erroneous, we conclude that we should affirm the rulings made.

Second, Staton challenges the district court's refusal to award punitive damages. We agree with the district court that there are no "aggravating circumstances" here to warrant an award of punitive damages. *See, e.g., Miller v. City of Mission*, 705 F.2d 368, 377 (10th Cir. 1983); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976).

Third, Staton claims that the district court erred in holding that the defendants were entitled to a good-faith immunity defense in their individual capacities. The court found that the defendants met their burden of proving that they acted without malice in discharging Staton, and that they neither knew nor reasonably should have known that their actions would violate Staton's constitutional rights. II R. 276. After examining the record

we are convinced that the detailed findings of the district court on this subject, II R. 374-78, have adequate record support and that the findings are sufficient to establish immnuity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982) (Public officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known."); *see also Vosgueritchian v. Maschner*, No. 83-1138 (10th Cir. March 5, 1984); *Miller, supra*, 705 F.2d at 374-76, 375 n.6.[4]

We have examined Staton's remaining arguments and find them to be without merit. Accordingly the judgment is

AFFIRMED.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

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[4] We must agree that there was uncertainty concerning the demands of procedural due process as to an unbiased tribunal. *Compare Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), *with Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936). We must also agree that the constitutional requirement on the extent of the Board's statement of reasons and of the evidentiary basis relied on was not clearly staked out for a case of this type when the Board acted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 73-112-C
(Consolidated)

JON TOM STATON,

Plaintiff,

vs.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20, OF MUSKOGEE COUNTY, OKLAHOMA,

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Case No. 77-186-C

JON TOM STATON,

Plaintiff,

vs.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20, OF MUSKOGEE COUNTY, OKLAHOMA,

Defendants.

[Filed Mar. 16, 1981]

MEMORANDUM OPINION

These consolidated cases were originally brought by Plaintiff under 42 U.S.C. §§ 1983, 1985 and 1988 chal-

lenging his dismissal as the superintendent of Defendant Independent School District No. 20 of Muskogee, Oklahoma (District). The individual Defendants were the three members of the five-member school board of the Defendant District who voted in favor of Plaintiff's dismissal. Plaintiff filed case number 73-112-C in April, 1973, and as relief sought reinstatement, expungent of the action of the Defendant District's school board, actual and punitive damages and other relief, including attorney's fees. A non-jury trial was conducted by the Court in 73-112-C and on April 3, 1975, the Court entered its Judgment dismissing Plaintiff's action as to all Defendants. Plaintiff then appealed this decision. In *Staton* v. *Mayes*, 552 F.2d 908 (Tenth Cir. 1977) 2-1 decision), *cert. denied*, 434 U.S. 907, 98 S.Ct. 309, 54 L.Ed.2d 195 (1977), the Tenth Circuit vacated this Court's judgment dismissing 73-112-C and remanded the case with directions that the decision of the Defendant District's school board dismissing Plaintiff be declared invalid and should be expunged. In the meantime Plaintiff filed 77-186-C wherein he sought the same relief sought in 73-112-C with the addition of damages allegedly incurred after the expiration of Plaintiff's employment contract in effect at the time of his dismissal in 1973.

On January 12, 1978, the Court entered Orders consolidating 73-112-C and 77-186-C, and directing the school board of the Defendant District to determine in accordance with the Tenth Circuit's decision in *Staton* v. *Mayes*, *supra*, whether it should proceed with removal procedures against Plaintiff. Also, the Court stayed further proceedings in 77-186-C until such a determination had been made by the Defendant District.

On January 24, 1978, the Defendant District advised the Court that it would not proceed with the removal procedures against the Plaintiff. Thereafter, several pretrial conferences were conducted in these cases and a

pretrial order and numerous pretrial briefs were filed. Said pretrial order recites that Plaintiff is now proceeding in this case under § 1983 only.

On January 9, 1980, the court overruled Plaintiff's Motion for Equitable Relief wherein Plaintiff asked to be placed on the payroll of the Defendant District while this action was pending. The Court pointed out in its Order that "[a]s the Court of Appeals noted on remand that a reinstatement of the Plaintiff would be inappropriate as his contract with the school district has expired, the relief sought by said Motion appears to have been specifically foreclosed herein by the Court of Appeals." Plaintiff's subsequent motion to certify this decision for an interlocutory appeal was denied by the Court on March 5, 1980.

Subsequently, the Court overruled the Defendant District's Motion for Summary Judgment on the issue of liability on September 11, 1980, and this matter was then set on the non-jury trial docket for October 30, 1980. On said date, these cases came on for non-jury trial as scheduled and the parties appeared in person and with their attorneys. A total of twelve witnesses, including the Plaintiff and the three individual Defendants, testified at the trial and numerous exhibits were received into evidence. In addition, the parties have stipulated in the pretrial order that all evidence and testimony considered at the previous trial of 73-112-C may be considered by the Court in reaching its decision herein. At the conclusion of the trial on October 31, 1980, the Court took this matter under advisement.

The facts found by this Court concerning Plaintiff's termination are set out in detail in the Court's Memorandum Opinion entered in 73-112-C on March 31, 1975, and are also extensively summarized in the Tenth Circuit's opinion in *Staton* v. *Mayes*, *supra*, so the same need not be repeated herein. No evidence has been presented to the Court to indicate that its previous findings of

fact are erroneous in any manner. Therefore, the Court hereby adopts its earlier findings insofar as the same are relevant to the Court's decision of this matter at this time. Furthermore, the Tenth Circuit determined in *Staton* v. *Mayes, supra,* that Plaintiff's Fourteenth Amendment rights to procedural due process of law were violated in connection with his termination by the Defendants as follows: (1) the decision to terminate Plaintiff was not made by an unbiased tribunal; and (2) the school board failed to state reasons for the decision to terminate Plaintiff and the evidentiary basis relied on for such decision. Therefore, as the Tenth Circuit has decided that Plaintiff's civil rights have been violated, this decision becomes the law of the case to be followed in all subsequent proceedings in this Court and in the appellate court. *First National Bank* v. *Material Service Corp.*, 597 F.2d 1110, 1116 (Seventh Cir. 1979); *Kansas ex rel. Beck* v. *Occidental Life Ins. Co.*, 95 F.2d 935, 936 (Tenth Cir. 1938), *cert. denied,* 305 U.S. 603, 59 S.Ct. 63, 83 L.Ed. 383 (1938); *see Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1116-1117 (Fifth Cir. 1980), *cert. denied,* —— U.S. ——, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *see also Quern* v. *Jordan,* 440 U.S. 332, 346 n.18, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Accordingly, this Court need only determine the liability of the Defendants for such violations and the damages, if any, to be awarded Plaintiff therefore. The Court will consider the issues of liability and damages seriatim.

LIABILITY OF THE DEFENDANT DISTRICT

In *Monell* v. *Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court held that local governing bodies such as the Defendant District "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordi-

nance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. Under the facts of the instant case, it is clear that the Defendant District falls within the *Monell* rule as the decision to terminate Plaintiff giving rise to these cases was officially adopted by the school board of the Defendant District. Moreover, it does not appear that the liability of the Defendant District is disputed as said Defendant has admitted in the pretrial order on file herein that it is liable to Plaintiff for $32,291.62 as the unexpired portion of Plaintiff's employment contract in effect at the time of his dismissal. Therefore, the Court determines that the Defendant District is liable to the Plaintiff for the violation of Plaintiff's civil rights set out above.

LIABILITY OF THE INDIVIDUAL DEFENDANTS

It is not clear from the pretrial order on file herein whether Plaintiff is seeking recovery against Defendants James K. Mayes (Mayes), Moody Wade (Wade) and Mike Moore (Moore) in their individual capacities or their official capacities or both. Nor do the pleadings in these cases clarify this matter. In this connection, examination of Plaintiff's Complaint in 77-186-C reveals that Plaintiff may be proceeding against Defendants Mayes, Wade and Moore solely in their individual rather than official capacities.[1] However, it appears from Plaintiff's Amended Complaint in 73-112-C that Plaintiff has sued said Defendants in both their individual and official capacities.[2] Under these circumstances, the Court will con-

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[1] Plaintiff alleges in Paragraph XI of his Complaint in 77-186-C that he was deprived "of liberty and property, without due process of law by Defendants [Mayes, Wade and Moore] in their individual capacities . . . ."

[2] Plaintiff alleges in Paragraph VI of his Amended Complaint in 73-112-C that he was deprived of his rights to procedural due process of law by the individual Defendants "in their individual capacities and as the majority of the governing Board of the De-

sider the individual Defendants as being before the Court in both their individual and official capacities. *See McGhee* v. *Draper*, —— F.2d ——, No. 79-1224, slip op. at 4 (Tenth Cir. Jan. 16, 1981). In this connection, the individual Defendants contend that under *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), they are not liable to Plaintiff as their actions herein were taken in reliance upon existing law and in good faith.

The recent case of *Familias Unidas* v. *Briscoe*, 619 F.2d 391 (Fifth Cir. 1980), summarizes the liability of public officials in damage actions brought under § 1983 as follows:

> Each defendant was sued in his individual, as well as official, capacity. As long as the actions upon which the section 1983 claim is predicated were taken in the good faith performance of his official duties, however, each defendant enjoys immunity from personal liability for damages. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (immunity for school board members); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 1974) (immunity for governor). *See Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (absolute immunity for judge for his judicial acts unless those acts are committed in the "clear absence of all jurisdiction"). The Supreme Court explained the good faith standard of *Scheuer* in *Wood*, setting up two tests, one objective and one subjective. Under the alternative *Wood* formulations, an official is personally liable for actions taken while discharging his official responsibilities only if:
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> > [1] [He] knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the consti-

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fendant, Independent School District Number 20 of Muskogee, County, Oklahoma . . . ."

> tutional rights of the [individual] affected, or [2] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [individual]. That is not to say that [officials] are "charged with predicting the future course of constitutional law."

420 U.S. at 322, 95 S.Ct. at 1001 (citation omitted).

. . . .

> This qualified, good faith immunity insulates defendants only from liability in their individual capacities, however. It has no effect on their liability in their official capacities in suits in which they are otherwise susceptible to damages awards.
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> [9] Actions for damages against a party in his official capacity are, in essence, actions against the governmental entity of which the officer is an agent. *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 2036 n.55, 56 L.Ed.2d 611 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974). Thus, damages may be awarded against a defendant in his official capacity if they would be available against the governmental entity, itself. *See Monell v. Department of Social Services*, 436 U.S. at 690 n.55, 98 S.Ct. at 2036 n.55.

619 F.2d at 403 (footnotes omitted); *See Rodriguez* v. *Board of Education*, 620 F.2d 362, 366 (Second Cir. 1980); *McGhee* v. *Draper*, 564 F.2d 902, 913-915 (Tenth Cir. 1977); *Highfield Water Co.* v. *Public Service Commission*, 488 F.Supp. 1176, 1195 (D. Md. 1980).

In view of the foregoing, it appears that in order for the qualified immunity standard set forth in *Wood* v. *Strickland*, *supra*, to apply to Defendants Mayes, Wade and Moore and thereby insulate them from liability to Plaintiff in their individual capacities, said Defendants must make an affirmative showing herein that they

neither knew nor reasonably should have known that the action they took as members of the school board of the Defendant District would violate Plaintiff's constitutional rights, and that said Defendants took such action without the malicious intention to cause a deprivation of constitutional rights or other injury to Plaintiff. *McGhee* v. *Draper, supra,* 564 F.2d at 913; *see Gomez* v. *Toledo,* 446 U.S. 635, 640-641, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The individual Defendants have met their burden of proof in this case. In this connection, it is clear from the record before the Court that procedures for disqualification of the school board members or for an alternate tribunal were not provided by Oklahoma law at the time of the board hearing on Plaintiff's dismissal in this case. *See Staton* v. *Mayes, supra,* 552 F.2d at 915. Thus, under the ancient common law "rule of necessity," the continuing validity of which was recently recognized by the United States Supreme Court in *United States* v. *Will,* 49 U.S.L.W. 4045, 4049-4050 (Dec. 15, 1980), the matter of Plaintiff's dismissal was properly before the school board of the Defendant District and the individual Defendants as members thereof. *See Brinkley* v. *Hassig,* 83 F.2d 351, 357 (Tenth Cir. 1936). Accordingly, the Court determines that the individual Defendants did not know or have reason to know that their participation in the hearing and decision to terminate Plaintiff of his rights to procedural due process of law. Furthermore, it does not appear that the failure to provide Plaintiff with reasons and the evidentiary basis relied on for the decision to terminate him was done by the individual Defendants with knowledge that such omission would violate Plaintiff's constitutional rights. On the contrary, the evidence before the Court, and particularly the testimony of Defendant Mayes, who is himself an attorney, indicates that the board members relied on the advice of the board's attorney in connection with the notice to Plaintiff of his proposed dismissal on the statutory grounds of willful neglect of duty and incompetence and as to the hearing procedure before the board. The board's decision to dis-

miss Plaintiff was reflected as a part of its minutes without further written or oral statements of findings apparently because of the good faith belief of the board members that such a brief notation of the board's decision in the minutes was all that was required.

Finally, the Court is unable to conclude from the evidence before it in this matter that the individual Defendants acted with malicious intention to deprive Plaintiff of his constitutional rights or otherwise injure him. Nor does the record herein establish that the individual Defendants acted with such an impermissible motivation or with such disregard of Plaintiff's established constitutional rights that their actions cannot reasonably be characterized as being in good faith. *See Wood* v. *Strickland, supra*, 420 U.S. at 322. Therefore, the Court finds and concludes that the individual Defendants are entitled to the qualified good faith immunity from liability for damages under § 1983 established by *Wood* v. *Strickland, supra*. Accordingly, Defendants Mayes, Wade and Moore are not liable to Plaintiff in their individual capacities in the instant case.

However, this good faith immunity has no effect on the liability of the individual Defendants in their official capacities as members of the school board of the Defendant District. *McGhee* v. *Draper, supra*, slip op. at 9; *Familias Unidas* v. *Briscoe, supra*, 619 F.2d at 403; *see Monell* v. *Department of School Services, supra*, 436 U.S. at 690 n.55: *see also Owen* v. *City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Therefore, as the Court has determined above that the Defendant District is liable to Plaintiff as a result of the actions of the individual Defendants, the Court concludes that the individual Defendants are liable to Plaintiff in their official capacities. *See Bertot* v. *School District No. 1*, 613 F.2d 245, 247 n.1 (Tenth Cir. 1979).

In summary, the Court finds and concludes that the Defendant District and the individual Defendants in

their official capacities only are liable to Plaintiff. Therefore, as any judgment rendered herein against the defendant school board members in their official capacities runs against the treasury of the defendant school district and is thus equivalent to a judgment against the school district itself, the Court will not distinguish between the Defendant District and the individual Defendants in their official capacities throughout the remainder of this Opinion. *Bertot* v. *School District No. 1, supra,* 613 F.2d at 247 n.1.

DAMAGES

In *Carey* v. *Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the United States Supreme Court stated that the basic purpose of a § 1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights and indicated that "[t]he lower federal courts appear to generally agree that damages awards under § 1983 should be determined by the compensation principle." 425 U.S. at 255 (footnote omitted). In this connection, it has been held that general principles of damages apply to civil rights actions. *Zarcone* v. *Perry,* 572 F.2d 52, 55 (Second Cir. 1978). Thus, any award of damages to Plaintiff herein is subject to the standard rules of mitigation. *Gremminger* v. *Seaborne,* 584 F.2d 275, 279 (Eighth Cir. 1978).

However, in a § 1983 case such as this one, damages are not presumed. *McGhee* v. *Draper, supra,* slip op. at 10; *see Carey* v. *Piphus, supra,* 435 U.S. at 261-264. Rather, Plaintiff must prove that the Defendants' denial of Plaintiff's right to procedural due process caused the injuries complained of in order for Plaintiff to recover the damages he seeks herein. *Id.* The Court, as the fact-finder in this case, must carefully separate the consequences of the inadequate procedures from the consequences of any board actions that are justified or allegations that are true. *McGhee* v. *Draper, supra,* slip

op. at 10. In this connection, the Court noted in its previous Memorandum Opinion in 73-112-C that the transcript of the school board hearing on Plaintiff's dismissal contained evidence which could amount to a willful neglect of duty and incompetence on the part of Plaintiff in the judgment and discretion of the school board. Additionally, evidence produced at the trial of this matter indicated that various problems within the Defendant District, including financial problems, problems arising out of a teacher evaluation plan the board directed Plaintiff to institute, a teachers' strike and problems in implementing a school desegregation plan, were directly attributable in varying degrees to Plaintiffs' actions or omissions as superintendent of the Defendant District and further supports the board's decision. Therefore, the Court determines that the board's decision to terminate Plaintiff was justified.

In the instant case, the pretrial order on file herein recites that Plaintiff is seeking the following relief:

"1. Loss of Earnings.

a. Unexpired portion of contract $32,291.61.

b. Damage to earning power, $480,708.38.

2. Loss of experience and professional growth, $100,000.00.

3. Pain and suffering from harrassment, $100,000.00.

4. Expense in seeking other employment, court costs and attorney fees, $60,000.00.

5. Punitive damages, $25,000.00.

6. Loss of participation in retirement program, $25,000.00.

7. Loss of liberty to practice chosen profession, $100,000.00."

The Defendants contend that they are not liable beyond the unexpired portion of Plaintiff's employment contract as the record concerning Plaintiff's dismissal has been expunged.[3] Defendants further contend that they are entitled to credit against the contract amount for any wages Plaintiff received or could have received from other employment.

The evidence before the Court establishes that at the time of his dismissal, which was effective March 15, 1973, Plaintiff was employed by the Defendant District pursuant to the terms of two employment contracts extending through June 30, 1974, at a salary of $25,000.00 per year. As noted above, Plaintiff claims that he is entitled to $32,291.61 as the balance due him under these contracts and Defendants admit Plaintiff's entitlement to this amount less mitigation. In this regard, Plaintiff testified that between the effective date of Plaintiff's dismissal and August, 1977, he applied for positions as a school superintendent or a related position in "fifty to one hundred" school districts throughout the country. Plaintiff also unsuccessfully applied for federal employment both through the Civil Service and directly with federal agencies. Plaintiff eventually obtained a job in 1975 as a local director for the Community Action Program at an annual salary of $12,000.00 which was raised to $15,000.00 a few months later. Plaintiff remained in this position until August of 1977 when he voluntarily removed himself from the job market to attend law school.

In view of the foregoing, the Court determines that Plaintiff fully carried out his duty to mitigate his damages during the unexpired term of his employment contracts and is therefore entitled to $32,291.61 as the unpaid balance thereof. *See, e.g., Cochran* v. *Chidester*

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[3] The parties stipulated at trial that the record concerning Plaintiff's dismissal was expunged in July, 1980.

School District, 456 F.Supp. 390, 396 (W.D. Ark. 1978). The Court further determines that Plaintiff is entitled to attorney's fees as the prevailing party herein as provided by the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Gurule* v. *Wilson*, 635 F.2d 782, 791 (Tenth Cir. 1980); *Love* v. *Mayor of Cheyenne*, 620 F.2d 235, 236 (Tenth Cir. 1980); *Stoddard* v. *School District No. 1*, 590 F.2d 829, 835 (Tenth Cir. 1979); *Greminger* v. *Seaborne, supra*, 584 F.2d at 279. However, in accordance with the Court's Order of September 21, 1979, the attorney's fees recoverable by Plaintiff herein are limited to those fees incurred by Plaintiff since his prior counsel, Kay Wilson, Jr., was allowed to withdraw from this case on said date. Also, Plaintiff is entitled to costs as provided by Rule 54(d), Federal Rules of Civil Procedure. However, Plaintiff is not entitled to the additional items of damages sought.

With respect to Plaintiff's claim for $25,000.00 in punitive damages (item #5 above), the Tenth Circuit has held that punitive damages are recoverable in a § 1983 action provided aggravated circumstances are found. *Silver* v. *Cormier*, 529 F.2d 161, 163 (Tenth Cir. 1976). Such aggravating circumstances include "reckless indifference to the property rights of others, ill will, a desire to injure or malice." *Id.* There is no evidence before the Court that such aggravating circumstances are present in this case. The remaining items of damages Plaintiffs seeks (*i.e.* damage to earning power, loss of experience and professional growth, pain and suffering from harrassment, expense in seeking other employment, loss of participation in retirement program and loss of liberty to practice chosen profession) are direct consequences of Defendants' justified dismissal of Plaintiff and thus are not recoverable by Plaintiff rather than consequences of the Defendants' violation of Plaintiffs' right to procedural due process of law by failing to provide Plaintiff with an unbiased tribunal and a state-

ment of the reasons and the evidence relied on for his termination. *See McGhee* v. *Draper, supra,* slip op at 10. Accordingly, the Court determines that Plaintiff is entitled to damages in this case in the total amount of $32,291.61, plus attorney's fees and costs.

CONCLUSION

In view of the foregoing, the Court finds and concludes that judgment should be entered herein in favor of Plaintiff against the Defendants Mayes, Wade and Moore in their official capacities and against the Defendant District in the amount of $32,291.61, plus attorney's fees and costs as set out in this Memorandum Opinion. The Court will withhold entry of final judgment in this case for fifteen (15) days to allow the parties to confer in an attempt to agree as to the amount of attorney's fees to be awarded Plaintiff. If the parties reach an agreement or fail to agree, the parties are directed to advise the Court accordingly. If an agreement is not reached, the Court will set this matter for a hearing to determine the amount of attorney's fees to be awarded Plaintiff in accordance with the standards set forth in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (Fifth Cir. 1974). *See Greminger* v. *Seaborne, supra,* 584 F.2d at 279. A final judgment will be entered herein upon resolution of the attorney's fees question.

IT IS SO ORDERED this 16th day of March, 1981.

/s/ Fred Daugherty
FRED DAUGHERTY
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1332

JON TOM STATON,
Plaintiff-Appellant,

v.

JAMES K. MAYES *et al.*,
Defendants-Appellees.

Argued Jan. 28, 1976

Decided Feb. 15, 1977

As Amended on Denial of Rehearing and
Rehearing En Banc April 11, 1977

As Amended on Denial of Rehearing
May 9, 1977.*

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* The petition of appellees for rehearing was denied by order of Judges Holloway and Doyle, Judge Barrett voting to grant rehearing; the petition of appellees for rehearing en banc was denied by Judges Hill, Holloway, McWilliams and Doyle, Chief Judge Lewis and Judges Seth and Barrett voting to grant rehearing en banc.

The petition of appellant for rehearing was denied on May 9, 1977, by the following order of Judges Holloway, Barrett and Doyle:

> On consideration of appellant's petition for rehearing directed to our revised opinion, and the Court being satisfied that no claim for reinstatement beyond the June 30, 1974, expiration of appellant's contracts was made or urged to the trial court

Before HOLLOWAY, BARRETT and DOYLE, Circuit Judges.

HOLLOWAY, Circuit Judge.

This civil rights suit challenges the dismissal of plaintiff, Dr. Staton, as superintendent of Independent School District No. 20 of Muskogee County, Oklahoma, which is named a defendant. Defendants Mayes, Wade and Moore were three members of the five-member board who caused the dismissal in February, 1973, following a hearing on charges of willful neglect of duty and incompetence. In April, 1973, this suit was brought alleging denial of due process and seeking reinstatement, expungement of the board's action, damages and other relief. After an evidentiary hearing the trial court rejected the constitutional claims and dismissed the action, and this appeal followed.

For some time before the dismissal, defendant Moore had voted against renewing plaintiff's contract. Defendant Wade had also voted once not to renew. However, they were outvoted and plaintiff had been continued as superintendent. Shortly before a school board election in January, 1973, a board majority voted for a renewal again and a contract with plaintiff extending to June 30, 1974, was approved.

In his election campaign defendant Mayes stated he would vote for a change in superintendent. He was elected and then took office on February 5, 1973, when the board met and organized. At that same meeting, the board voted a proposed dismissal of plaintiff. A letter was sent to Dr. Staton the next day notifying him of the proposed dismissal on grounds of willful neglect of

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and that a court order for reinstatement would be inappropriate in the circumstances before us, the appellant's petition is denied.

duty and incompetence, and of a hearing scheduled on February 19.[1]

Dr. Staton appeared at the hearing with counsel and 12 witnesses. After the first witness called by the board to support the charges was sworn, but before he began to testify, plaintiff's attorney objected to the introduction of any testimony, challenging the proceedings on several grounds.[2] The board heard the objections but went for-

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[1] The letter stated:

February 6, 1973
Muskogee, Oklahoma

Dr. Jon Tom Staton
4301 West Broadway
Muskogee, Oklahoma 74401

Dear Dr. Staton:

The Muskogee School Board of District I-20 has voted to dismiss you as Superintendent of Schools for said District.

Please be advised that this is a notice of the proposed dismissal and that the charges against you are willful neglect of duty and incompetency. These charges are brought by this School Board.

Please further be advised that a hearing on the proposed dismissal shall be held at the Education Center, 570 North 6th Street, Muskogee, Oklahoma on February 19, 1973, at 7:30 P.M.

Please be further advised that you are entitled to be present and represented by counsel at said hearing.

Yours very truly,

(signed)

MIKE MOORE
President of the Muskogee
School Board, District I-20

[2] Plaintiff's counsel objected that: (1) the superintendent was dismissed prior to the hearing, contrary to the Oklahoma statutes; (2) the notice failed to state who brought the charges; (3) the charges failed to state what the acts constituting alleged incompetence or willful neglect of duty were, or when committed, failing to apprise of matters necessary for defense; (4) not all the board was present (one member was absent); (5) there was a denial of due process; (6) the board was exceeding its jurisdiction to hold a hearing, not heaving served the teacher with a statement of charges or an identification of accusers; and (7) the board was biased and there was no procedure to challenge that bias.

ward with the hearing, which Dr. Staton had transcribed.[3]

The hearing was conducted on the evenings of February 19 and 20. On February 22 at a third session, defendants Mayes, Moore and Wade voted to dismiss Dr. Staton effective March 15, with suspension of all his authority to continue until that date. Board member Matthews voted not to dismiss plaintiff and Mrs. Chandler was absent. The board's action was reflected as a part of its minutes.[4] There were no further written or oral statements of findings on the dismissal.

Although several grounds were alleged as the basis of the civil rights complaint, the court trial was confined to two issues, adequacy of notice of the hearing and alleged bias by the board. The trial court's memorandum opinion found against plaintiff on both grounds and dismissed. On appeal plaintiff makes these principal arguments, claiming denial of procedural due process: (1) the notice gave no specifics of the acts or deficiencies considered to amount to willful neglect of duty or incompetence, nor any of the adverse witnesses; and (2) the board majority causing the dismissal had made public statements or private commitments against plaintiff, showing a biased tribunal. Plaintiff argues that the adverse testimony established no incompetence or willful

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[3] The transcript is part of our record, Plaintiff's Ex. 17, now R. IV.

[4] The minutes stated (R. III, 203):

3. *Dismissal of Dr. Jon Tom Staton*

IT WAS MOVED by Mr. Mayes and seconded by Mr. Wade THAT DR. JON TOM STATON BE DISMISSED, HIS DISMISSAL TO BE EFFECTIVE MARCH 15, 1973, THE FIRST TWO WEEKS IN MARCH TO BE CONSIDERED THE USUAL VACATION AND THAT THE SUSPENSION OF ALL RESPONSIBILITIES AND AUTHORITY CONTINUE UNTIL SUCH DATE.

Vote Yes—Mayes, Wade, Moore. No—Matthews. The motion was declared carried by a three to one vote.

neglect of duty and that it dealt only with vague terms such as "disharmony." He says that any "disharmony" was only reaction to an integration system, a teacher evaluation program and an annexation plan, all of which the board had ordered Dr. Staton to implement. Plaintiff also argues there were no findings by the board after its hearing and no adequate findings by the trial court on the issues before it. (Brief of Appellant, 15-16, 21, 30, 37).

The right to procedural due process

As the predicate for his procedural due process claim, plaintiff argues that he had a property interest by virtue of his contracts that had been renewed to extend to June 30, 1974, at $25,000 per year, with 1-5/12 years remaining (Brief of Appellant, 15). And he asserts that he had a deprivation of liberty and property by the stigma of being branded incompetent and guilty of willful neglect of duty.

We must agree with both contentions.[5] Plaintiff had a legitimate claim of entitlement to his position derived from his contracts. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548. Moreover, this was a proposed dismissal of a professional officer by a public body for willful neglect of duty and incompetence. These charges were made publicly and might seriously damage plaintiff's standing and associations in his community and affect his good name and reputation.[6] See

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[5] We do not understand the defendants' arguments to deny that "property" and "liberty" interests were involved.

[6] The February 5 meeting where it was decided that notice of the proposed dismissal should be given for willful neglect of duty and incompetency was a regular meeting attended by representatives of the news media and a room full of guests (see Minutes, R. III, 210). The hearings on February 19 and 20 were also open meetings, with numerous witnesses present to testify. And the February 22 meeting where the decision was made to dismiss plaintiff was also attended by representatives of the news media and

id. at 573, 92 S.Ct. 2701; *Wellner v. Minnesota State Junion College Board*, 487 F.2d 153, 155-56 (8th Cir.); *Huntley v. Community School Board of Brooklyn*, 543 F.2d 979, 985 (2d Cir.). Dismissal on such grounds would likely have serious effect on his ability to take advantage of other employment,[7] see *Powers v. Mancos School District*, 539 F.2d 38, 43 (10th Cir.), there being no mere private communication of the grounds for discharge as in *Bishop v. Wood*, 426 U.S. 341, 347-348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684.

We are convinced that the procedural due process guarantee applied to insure the plaintiff fundamentally fair procedures in connection with these proceedings concerning his proposed discharge.

Adequacy of the notice

Plaintiff argues that the mere notice of charges of incompetence and willful neglect of duty, without specificity as to acts or deficiencies alleged, and without naming adverse witnesses, amounted to a denial of due process (Brief of Appellant, 15, 28).

At a minimum, the Due Process Clause of the Fourteenth Amendment required notice and an opportunity for hearing appropriate to the nature of the case before deprivation of the liberty or property interests of plaintiffs which have been identified. See *Roth*, supra, 408 U.S. at 573, 576 n. 15, 92 S.Ct. 2701; *Goss v. Lopez*, 419 U.S. 565, 579, 581, 95 S.Ct. 729, 42 L.Ed.2d 725. These basic requirements must be determined with consideration of both the nature of the state function involved as

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guests (see Minutes, R. III, 203). Thus the circumstances were unlike the private communication of reasons for dismissal in *Bishop v. Wood*, 426 U.S. 341, 347-348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684.

[7] There was uncontradicted expert testimony at trial as to the adverse effect on a school official's career of a dismissal based on such charges (R. I, 87-91).

well as of the private interests affected by the governmental action. *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230. And in connection with possible judicial interposition in cases like this, we must be mindful of the commitment in our Nation of public education to the control of state and local authorities. *Goss v. Lopez*, supra, 418 U.S. at 578, 95 S.Ct. 729.

The trial court rejected the argument on lack of adequate notice, pointing to the use in the letter of the statutory terms of grounds for dismissal, to the plaintiff's failure to ask for a bill of particulars or a more definite notice, and to plaintiff's apparent realization of what was involved as shown by his preparedness to meet the charges at the hearing.

It is true that the charges of incompetency and willful neglect of duty were grounds of removal provided in 70 O.S.A. § 6-103.[8] However, we cannot agree that this, without more, shows meaningful notice of what one must be prepared to meet. We do agree that the lack of any objection to the notice letter and the absence of any request for a more definite statement of the charges are significant. There was a reasonable time interval of 13 days between mailing the notice and the hearing itself. Nor until the first witness at the hearing was called was any objection made to adequacy of the notice.

Plaintiff objects to the trial court's reasoning, citing *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir.), which did reject a similar argument on lack of request for a hearing. The First Circuit held there that a teacher was not

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[8] While no pendent claim of any failure to meet State notice requirements is asserted, we note that the Oklahoma Court has enforced a state statutory requirement of notice containing a statement of causes related to a legal cause for dismissal, before a hearing. See *Lovelace v. Ingram*, 518 P.2d 1102 (Okl.). Of course, in addition to state requirements, federal due process minimum standards must be observed.

barred from asserting a due process claim of lack of a hearing by failure to request a hearing. We have no disagreement with the reasoning there applied.

We feel that here, however, since *some* notice was given to the plaintiff a reasonable time ahead of the scheduled hearing, an objection to the sufficiency of the notice not made until commencement of the hearing came too late. In fact, since his counsel made the objection quite fully and formally as the testimony started, with no request for a continuance, it is difficult for plaintiff to argue against a ruling of a knowing waiver. Particulars of asserted grounds for dismissal have been furnished in similar cases, *e. g., Simard v. Board of Education of Town of Groton*, 473 F.2d 988, 991 n.5 (2d Cir.); *Blunt v. Marion County School Board*, 515 F.2d 951, 954 (5th Cir.), and in the circumstances before us, we feel that the belated claim of insufficiency of the notice does not demonstrate a denial of due process. Cf. *Grimes v. Nottoway County School Board*, 462 F.2d 650, 653 (4th Cir.). Moreover, there is no persuasive showing that the defense was impeded by lack of further details. *Simard v. Board of Education of Town of Groton*, supra at 994.

In sum, we cannot sustain the claim that there was a defective notice which amounted to a denial of due process.

The claim of a biased tribunal

Plaintiff's most substantial claim of denial of procedural due process is that the board was a biased tribunal. The point requires examination of the background and of the system of school administration involved.

The board is an elective body under Oklahoma law. 70 O.S.A. § 5-107A. At the time this dispute arose the board was the only body empowered to dismiss a superintendent for willful neglect of duty or incompetency.[9]

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[9] As noted in discussing our disposition, this procedure is now changed and certain appellate bodies may now make the final decision on removal after a board hearing.

In cases involving these grounds for removal, the board's decision at the hearing was final. 70 O.S.A. § 6-103.[10] No provision was made for a hearing by an alternative tribunal or for disqualification of board members on a challenge of bias or prejudice.

At the opening of the hearing on the proposed dismissal of Dr. Staton, several objections to the proceeding going forward were made. One objection was "to the bias of the board and no procedure to challenge that bias and constituting deprivation of due process." (R. IV, 9).

We start with a fundamental constitutional principle: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942; see also *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46, 50, 70 S.Ct. 445, 94 L.Ed. 616. Due process itself however, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. In a recent similar case the Supreme Court stated that "[d]etermining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482, 494, 96 S.Ct. 2308, 2315, 49 L.Ed.2d 1.

There is an obvious interest of the State in the particular procedure provided for removal of school personnel. As the trial court observed, there is a system of

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[10] 70 O.S.A. § 6-103 affords procedures for the removal of teachers. However § 70 O.S.A. § 1-116 provides that the definition of a "teacher" includes superintendents generally for purposes of the Oklahoma school code.

administration by an elective board which governs the affairs of the school district and employs and dismisses superintendents and teachers. And as in the *Hortonville* case, when the hearing was held the board was the only body empowered to employ and dismiss. In such a case we have said that out of necessity, disqualification will not be permitted to destroy the only tribunal with power to act. See *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir).

On the other hand, an individual like the plaintiff has a profound interest in the fairness of the hearing tribunal whose decision may jeopardize interest in his position and his liberty interest of standing and reputation in his profession. See *Board of Regents v. Roth*, 408 U.S. 564, 573, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548. In connection with the fairness and the appearance of fairness of the board, we must weigh these circumstances:

During the month before the hearing, defendant Mayes made public statements in his campaign for election to the board concerning Dr. Staton. In newspaper advertising Mayes stated that defendants Moore and Wade had publicly said that no progress could be made with school problems until there was a new superintendent, that he, Mayes, was pledged to seek a new top level administration for the schools, that from discussions with parents, teachers and citizens it had become apparent to him that the trouble lay with the superintendent, and that he would vote to make the necessary change. (See Plaintiff's Exhibits 12, 13 and 14 in the appendix to this opinion). Mayes testified at trial, however, that he had not committed himself before hearing the evidence to vote for plaintiff's dismissal and felt the decision had to be based on the evidence at the hearing. (R. I, 98-99). It was Mayes who moved for the dismissal, the motion carrying by the votes of Mayes, Moore and Wade. (See note 4, supra).

The other defendants testified at trial also. Moore said he listened to the evidence at the hearing and required proof to be there and based his decision on the evidence he heard at the hearing. He admitted going to visit with a board member, Mrs. Chandler, and saying there was a possibility plaintiff would be leaving and if they could "be together on the board and not disrupt the board, where we could continue to have school for children, it would be best for all of us." (Id. at 102-03).

Defendant Wade testified that he based his decision on disruption between the principal, the teachers and the community and felt that plaintiff was the prime cause after he had heard all the evidence, and based his decision on that. He said he had not been committed to terminate plaintiff before hearing the evidence. He admitted saying to Mrs. Chandler in late 1972, after another hearing in Oklahoma City, that Dr. Staton "has got to go." (Id. at 106-07).

The firm public statements before the hearing by defendant Mayes for the removal of Dr. Staton, and the discussions by defendants Moore and Wade as admitted, reveal a tribunal not meeting the demands of due process for a hearing with fairness and the appearance of fairness. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 138 U.S.App.D.C. 152, 425 F.2d 583, 590-92; *Texaco, Inc. v. F.TC*, 118 U.S.App.D.C. 366, 336 F.2d 754, 759-60. These were not mere statements on a policy issue related to the dispute, leaving the decision maker capable of judging a particular controversy fairly on the basis of its own circumstances. *Hortonville*, supra, 426 U.S. at 492-493, 96 S.Ct. at 2314. Nor was this simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges. *E. g., Withrow v. Larkin*, 421 U.S. 35, 52-55, 95 S.Ct. 1456, 43 L.Ed.2d 712; and see *Kennecott Copper Corp. v. F.T.C.*, 467 F.2d 67, 79-80 (10th Cir.).

Instead this case involves statements on the merits by those who must make factual determination on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 138 U.S.App.D.C. 152, 425 F.2d 583, 590-92. The hearing involved the possibility of an erroneous and unfair factual decision which was absent in *Hortonville*, where the basic facts were admitted See, 426 U.S. at 494, 96 S.Ct. at 2315. And the ruling here concerned factual decisions on alleged incompetence and willful neglect of duty—issues which were both hotly contested and of critical effect on the liberty and property interests of the plaintiff.[11]

We are mindful of the reference in the trial court's opinion to the testimony by each defendant that they voted to dismiss plaintiff based on the evidence presented at the hearing, and that the plaintiff had failed to establish that he was denied procedural due process. While the defendants testified that they required proof at the hearing and decided on the basis of the proof, the evidence is uncontradicted on the making of several public statements by defendant Mayes for the removal of plaintiff, and of unfavorable discussions by Moore and Wade as well. We are convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of these circumstances. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 138 U.S. App.D.C. 152, 425 F.2d 583, 590-92 (due process not afforded in view of a prior public statement by *one*

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[11] We have noted the statement in the trial court's memorandum opinion that the record of the board hearing reveals evidence of shortcomings of the plaintiff which could amount to a willful neglect of duty and incompetence in the judgment and discretion of the board.

Due to the infirmity we find in the board's decision in the case, we need not decide whether the record supports the board action.

commission member);[12] see *In Re Murchison*, 349 U.S. 133, 139, 75 S.Ct. 623, 99 L.Ed. 942; *Texaco, Inc. v. F.T.C.*, 118 U.S.App.D.C. 366, 336 F.2d 754, 759-60; *Perlman v. Shasta Joint Junior College District Board of Trustees*, 9 Cal.App.3d 873, 88 Cal.Rptr. 563, 570 (3d Dist.); and see *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287. On the record as a whole we are left with the firm conviction that this board decision cannot stand and that a mistake was made in the ruling denying the due process claim. *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129.

We do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession. See *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548. When the constitutional guarantee of an impartial and fair hearing is invoked at that stage, the due process considerations must prevail. See *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942.

We are also mindful of the fact that disqualification or an alternate tribunal were not provided for at the

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It suffices to note that the record shows no admitted set of facts concerning plaintiff as were present in *Hortonville*. The proof presented serious fact problems.

[12] There was undisputed proof of earlier statements by three Board members that Dr. Staton should be removed. In addition to that of defendant Mayes and his reference to earlier public statements by defendants Moore and Wade (see Appendix), there was proof of such statements during campaigns by defendants Moore and Wade in the record of the Board hearing by testimony of a former Board member. (See Hearing Transcript, p. 342, which was made plaintiff's Ex. 17, and defendants' Ex. 1). The proof of these statements by the three Board members was not disputed.

time of the board hearing. We realize that both the board and the trial court faced this problem. There was also the rule of necessity to consider, a rule applied in some circumstances to permit tribunals to proceed, despite disqualification problems. See *Brinkley v. Hassig*, supra, 83 F.2d at 357. However, the Oklahoma legislature has now provided appeal remedies after a board decision, with a full hearing and review on the facts by the Professional Practices Commission and further appeal to the State Board of Education. See 70 O.S.Supp. 1975, § 6-103. Thus means are now available for an equitable solution protecting the right to a fair hearing.

After our disposition which will require setting aside the prior board decision, if the board should determine that it should proceed with removal procedures against the plaintiff, and a new removal decision is entered, the appeal remedies can be used for a full review on the facts and a decision by other tribunals, if a challenge is made to the fairness of the tribunal and the new decision. Cf. *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 101, 95 S.Ct. 289, 42 L.Ed.2d 249; *Wilson v. City of Port Lavaca*, 391 U.S. 352, 88 S.Ct. 1502, 20 L.Ed.2d 636. We feel this disposition proper and necessary to respect the constitutional guarantee of a fair hearing.

Conclusion and disposition

Only one issue requires further discussion. This is the claim by plaintiff that the failure of the board to make findings after the hearing amounted to a denial of due process (Brief of Appellant, 30). While the issue was not urged in the trial court, it may be of importance in further proceedings and it has due process implications justifying our consideration on the merits. *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir.).

After the hearing, the Board's decision was resolved by a minute that merely noted plaintiff's removal on motion by defendant Mayes, with defendants Mayes, Wade

and Moore voting for removal. (Plaintiff's Ex. 4). Assuming that such action did imply a finding that the removal was based on the general charges of incompetence and willful neglect of duty in the notice of the proposed removal, such conclusory terms were not sufficient to sustain the action under due process principles. While there need be no full opinion or even formal findings of fact and conclusions of law, the decision maker should state the reasons for the determination and the evidentiary basis relied on. See *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287; *Kinsella v. Board of Education*, 378 F.Supp. 54, 60 (W.D.N.Y.). Such rudimentary statements of reasons are a safeguard against a decision on ex parte evidence. We must agree that those fundamental elements were lacking here, and this has compounded the difficulty of the case. A statement of reasons and a fair indication of the evidentiary basis relied on should be given in such a decision.

For reasons stated earlier, under Fourteenth Amendment due process principles we must hold that the adverse determination on the charges against Dr. Staton is invalid. Accordingly, we vacate the judgment of the trial court and remand with directions that the former determination on the charges be declared invalid and that it should be expunged.

The Board of the defendant District may then consider, if it wishes, making a new finding on the charges to determine whether the earlier removal on them was proper. If a new decision on the charges is entered by the Board and challenges to it are made, disposition by the trial court will be withheld to permit completion of any State appeal or review proceedings. On conclusion of such proceedings, the trial court may then consider whether further equitable or compensatory relief may be proper.[13]

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[13] We have noted that the contracts between the board and the plaintiff have expired and hence a reinstatement order would be

APPENDIX

Plaintiff's exhibit 12 is a copy of a campaign statement of defendant Mayes appearing in a Muskogee newspaper on January 22, 1973. In pertinent part the statement read:

> MIKE MOORE and MOODY WADE: The only members of the present school board with children in school have stated publicly that no progress can be made with our school problems until we get a new superintendent.
>
> JIM MAYES:
>
> The candidate with a child in school, is pledged to seek a new top level administration for our schools. With 2 members of a 5 member board who already feel the same way, a new superintendent is now possible.

Plaintiff's exhibit 13 is a campaign statement of defendant Mayes appearing in a Muskogee newspaper on January 17, 1973, which stated in part:

> The only thing you as a Muskogee citizen can do now is to vote for the one candidate for the board of education who pledges to get a sound curriculum for the students and teachers, and to get rid of an unsound administration for Muskogee.

Plaintiff's exhibit 14 was a campaign statement of defendant Mayes appearing on January 23, 1973 in a Muskogee newspaper, which stated in part:

> FROM DISCUSSIONS WITH PARENTS, TEACHERS, AND CONCERNED CITIZENS DURING THE COURSE OF THE CAMPAIGN IT HAS BE-

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inappropriate. After any further hearings which may be held by the administrative boards to determine whether the earlier ruling against the plaintiff was proper, the trial court may consider whether any other relief is appropriate.

COME APPARENT TO ME THAT THE TROUBLE WITHIN THE MUSKOGEE SCHOOL SYSTEM LIES WITH THE PRESENT SUPERINTENDENT AND THAT PROGRESS FOR EDUCATION IS IMPOSSIBLE UNLESS A CHANGE IS MADE. IF ELECTED I WILL VOTE TO MAKE THE NECESSARY CHANGE.

SIGNED

JAMES K. MAYES, JR.

BARRETT, Circuit Judge, dissenting:

I respectfully dissent.

The majority opinion recognizes that at the time the hearing was held before the five member school board, Oklahoma law had no provision for a dismissal proceeding before any other body or tribunal. In *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936) we recognized the so-called "rule of necessity." We there said:

> . . . *some of the board [members] had expressed such prejudice, and doubtless all were in fact prejudiced.* . . . From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. . . . Findings of administrative tribunals . . . cannot be overturned . . . *as long as it [the result] is reached from a consideration of substantial evidence produced at the hearing.* . . . (Emphasis supplied.)
>
> 83 F.2d, at pp. 356-358.

I would apply the rule laid down in *Brinkley* in the case before us. We noted in *Brinkley* that such administrative tribunals as the FTC, the ICC and state Public Service Commissions investigate, file complaints, conduct the hearings on charges preferred and decide the ulti-

mate issues in controversy. We did not find prejudice *per se* which, in my judgment, is the effect of the majority opinion in this case. Such prejudice and bias has been determined notwithstanding that the three challenged board members, Mayes, Moore and Wade, testified before the district court that their public statements and campaign material critical of Superintendent Staton aimed at his removal from the school system *did not* prejudice them in the decisional process at or following the hearing. Furthermore, the district court found a lack of prejudice following an evidentiary hearing.

The "rule of necessity" has been invoked in many cases similar to that presented here. These cases stand for the proposition the the type of bias or prejudice attributed to the three board members in this case is not such as to disqualify them from hearing the matter. *See: Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920) where the validity of taxing income of judges was heard in that there was no other appellate tribunal available; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *Loughran v. Federal Trade Commission*, 143 F.2d 431 (8th Cir. 1944); *State ex rel. Burns v. City of Livingston*, 144 Mont. 248, 395 P.2d 971 (1964).

The majority opinion cites to the recent *Hortonville* decision rendered by the Supreme Court. Significantly, the Court, in reversing, while not directly discussing the Wisconsin Supreme Court's decision to "fashion" a remedy involving alleged bias and prejudice on the part of school board members in a hearing involving dismissal of teachers, nevertheless did not lend any comfort or support to the Court's order that any teacher dissatisfied with the board's decision could obtain a *de novo* hearing before a county court on *all issues*. The Supreme Court impliedly rebuked the Wisconsin court for "fashioning" the remedy referred to by stating (a) that a decision-maker is not disqualified because he has taken a position

on a policy issue related to the dispute (and, I submit, the manner of performance by a school superintendent does involve a policy issue insofar as board members are concerned) and (b) that state law vests the government or policy-making function exclusively in the school board; the federal courts must guard against altering the statutory powers of a state created board as a matter of federal due process.

I readily agree that 70 O.S.A. § 6-103, prior to the 1975 amendments, under which the board proceeded in the instant case, lacked both procedural and substantive due process. Even so, in each case we must look to the record in order to ascertain whether, *in fact*, the complaining party has been provided a fair and adequate notice of charges, a proper opportunity to be heard, to confront witnesses, appear with counsel and—most significantly—whether the board rendered adequate findings of fact (or adequately stated reasons) for its ultimate decision from which state courts could, upon appeal and review, determine whether the board's *decision* is based on substantial evidence and is not arbitrary, capricious or unreasonable. This, to me, should be the *sole* concern of the courts. If the respective state legislative bodies determine, as Oklahoma has, to provide substantially more right of review, *de novo* or otherwise, that is a determination reserved to the states.

My cursory review of applicable statutes in the states of our Circuit indicates that those of Colorado (C.R.S. 1973, Art, 63, § 22-63-117), Kansas (K.S.A., 1974 Supp. §§ 72-5436 through 72-5445, L.1974 Ch. 301) and Utah (Utah Code Anno.1953, 1975 Supp., Vol. 5B, §§ 53-51-1 through 53-51-9) likely "pass muster" when measured against the due process commands of the majority opinion in the instant case. However, the same does not appear true for the States of New Mexico and Wyoming. Both statutory arrangements (N.M.S.1953, Anno., 1975 Supp., §§ 77-8-12 through 77-8-17; Wyoming Statutes,

1957, 1975 Cum.Supp., Vol. 6, §§ 21.1-151 through 21.1-164) provide for hearings before the school board, with procedural and substantive due process requirements equal to those prescribed under the model Administrative Procedure Act, with full review accorded. The Supreme Courts of both states have held that there is no deprivation of due process, *per se*, resulting from dismissal proceedings conducted by the very board which through one or more of its members or an agent has (a) given notice of the determination to dismiss before the hearing and (b) submitted a statement of "cause" if a hearing should be requested by the teacher, and thereafter heard and decided the issues presented. Upon a required complete record of the proceedings, the appellate courts examine to determine whether there is substantial evidence in support of the board's findings and conclusions. If the courts determine that the board acted arbitrarily, capriciously or unreasonably, the decision is set aside. *See: Monahan v. Board of Trustees, etc., County of Fremont*, 486 P.2d 235 (Wyo. 1971); *Wickersham v. New Mexico State Board of Education*, 81 N.M. 188, 464 P.2d 918 (1970).

In my view the procedure above related provides adequate due process guarantees. Regardless of any prehearing bias or prejudice such as that attributed to Mayes, Wade and Moore, the reviewing courts must examine the complete record of the administrative proceedings and determine (a) whether procedural due process was accorded and (b) whether the dismissal was justified *on the merits based on substantial evidence.* Given the above related due process protections which I believe any person occupying a position such as that of Superintendent Staton is entitled, I would not hesitate to follow and apply the rule we laid down in *Brinkley, supra.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. CIVIL-73-112

JON TOM STATON,

Plaintiff,

—VS—

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,

Defendants.

[Filed Jan. 12, 1978]

ORDER

In April, 1973, Plaintiff brough this civil rights action challenging his dismissal as Superintendent of Defendant Independent School District No. 20 of Muskogee County, Oklahoma, (District) and sought reinstatement, expungement of the dismissal action, damages and other relief. In addition to the District, James K. Mayes, Moody Wade and Mike Moore, the three members of the District's five-member school board who caused Plaintiff's dismissal, were named as Defendants in this case. The Court subsequently dismissed this action and Plaintiff appealed. In *Staton* v. *Mayes*, 552 F.2d 908 (Tenth Cir. 1977), *cert. denied*, —— U.S. ——, —— S.Ct. ——, 54 L.Ed.2d 195 (1977), the United States Court of Appeals for the Tenth Circuit vacated this Court's judgment dismissing this action and remanded this case with directions that the school board's decision dismissing Plaintiff be declared invalid and should be expunged.

Therefore, pursuant to the Tenth Circuit's decision in *Staton* v. *Mayes, supra,* the Court hereby directs the school board of Defendant District to determine whether it should proceed with removal procedures against Plaintiff. The school board may make a new finding on the charges against Plaintiff to determine whether the earlier removal on them was proper. Should the school board determine that Plaintiff's removal is warranted and enter a new removal decision, said decision must state the reasons for this determination and the evidentiary basis relied on by the school board in reaching its decision. If a removal decision is entered and challenges to it are made, any state appeal or review proceedings[1] must be completed before the Court will consider whether further relief is appropriate.

It is so ordered this 12 day of January, 1978.

/s/ Fred Daugherty
FRED DAUGHERTY
United States District Judge

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[1] *See* 70 Okla. Stat. Supp. 1977 §§ 6-102.1—6-103.14.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 73-112 Civil

JON TOM STATON,

Plaintiff,

-vs-

JAMES K. MAYES, MOODY WADE, MIKE MOORE, and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,

Defendants.

[Filed Mar. 31, 1975]

MEMORANDUM OPINION

Plaintiff was Superintendent of Defendant School District. The individual Defendants are members of the Board of Education (Board) of Defendant School District. For sometime Defendant Moore had been displeased with Plaintiff's services and had voted several times against renewing his annual contract. Defendant Wade had voted on one previous occasion not to renew Plaintiff's contract. However, Moore and Wade had been outvoted and a majority of the Board had approved annual contracts for Plaintiff for several years past. A School Board election was to be held in January of 1973. Normally Plaintiff's contract had been renewed each year by the Board (for a one year period starting the following July 1) following the School Board Election. Defendant Mayes ran for the School Board on a campaign that he would vote for a change in the Superintendent.

As Defendants Moore and Wade had both previously voted not to renew the Plaintiff's contract, if Mayes was successful in his race, a majority of the five-member board would be in office in early 1973 who might not renew Plaintiff's contract for the year starting July 1, 1973. In this situation the old Board which had supported the Plaintiff by a majority vote chose to break with customary practice and voted on December 4, 1972 to employ the Plaintiff for the year beginning July 1, 1973. This action obviously was to prevent Mayes, if elected, from voting on the Superintendent's contract for the year beginning July 1, 1973. Defendant Mayes was elected in January, 1973 and took office on February 5, 1973. On February 6, 1973 the School Board met, organized and voted the proposed dismissal of the Plaintiff on the statutory charges of willful neglect of duty and incompetence.

The procedure for dismissing one in Plaintiff's position [1] is prescribed by Oklahoma law in 70 Oklahoma Statutes § 6-103 which provides in pertinent part as follows:

> "§ 6-103. Dismissal of teacher-Grounds-Notice-Hearing
>
> Upon hearing as hereinafter provided, any teacher may be dismissed at any time for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. Before any teacher may be dismissed, written notice of the proposed dismissal shall be given him by the board of education in independent school districts, or by the county superintendent of schools in depend-

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[1] Plaintiff was a District Superintendent. 70 Oklahoma Statutes § 6-103 is entitled Dismissal of teacher. But 70 Oklahoma Statutes § 1-116 provides that the term "teacher" in the Act means and includes one employed as a District Superintendent.

ent school districts. Said notice shall contain a statement of the charges upon which a hearing is sought and by whom brought. The teacher complained of shall be notified of the date of the hearing, which shall be not less than ten (10) days from the date of said notice. The teacher shall be entitled to be present and to be represented by counsel. In the case of a teacher in a dependent school district, the hearing shall be before the county superintendent of schools and the board of education of the district in which the teacher is employed. In independent school districts it shall be before the board of education of such school district. In all cases a majority vote of those constituting the board, before which said hearing is held, shall be required in order to sustain the charges against the teacher charged and in dependent school districts the county superintendent of schools must concur. Provided in cases involving incompetency or neglect of duty, the decision arrived at at said hearing shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county."

The written Board notice of the proposed dismissal of the Plaintiff, dated February 6, 1973, was as follows:

"February 6, 1973
Muskogee, Oklahoma

Dr. Jon Tom Staton
4301 West Broadway
Muskogee, Oklahoma 74401

Dear Dr. Staton:

The Muskogee School Board of District I-20 has voted to dismiss you as Superintendent of Schools for said District.

Please be advised that this is a notice of the proposed dismissal and that the charges against you

are willful neglect of duty and incompetency. These charges are brought by this School Board.

Please further be advised that a hearing on the proposed dismissal shall be held at the Education Center, 570 North 6th Street, Muskogee, Oklahoma on February 19, 1973, at 7:30 P. M.

Please be further advised that you are entitled to be present and represented by counsel at said hearing.

Yours very truly,

MIKE MOORE
President of the Muskogee
School Board, District I-20"

On February 19, 1973 the hearing commenced. It was concluded on February 20, 1973 and in all about eight hours were consumed in the hearing. The Plaintiff appeared at the hearing on February 19 and 20, 1973 with counsel and certain objections were made on February 19, 1973 to include a complaint of inadequate notice of the hearing and that the Board as a tribunal in this case was biased against the Plaintiff. After the hearing the Board on February 22, 1973 by a three to one vote with one member absent dismissed Plaintiff on grounds of willful neglect of duty and incompetence.

Plaintiff then brought this action against Defendants under 42 U.S.C. § 1983 in which he claimed that the Defendants in dismissing him were acting under color of State law and deprived him of procedural due process in violation of his Constitutional rights. As the Defendant School District is not a "person" under 42 U.S.C. § 1983 it was on Motion dismissed out of the case. Plaintiff then filed an Amended Complaint alleging jurisdiction as to the School District and the individual Defendants under 28 U.S.C. § 1331 (federal question).

The relief sought by Plaintiff is reinstatement for the balance of his contractual period to June 30, 1974 (which date has passed during the pendency of this litigation), expungement of the Minutes of the Board Meetings which make reference to Plaintiff being incompetent or willfully negligent in the performance of his duties, damages against all Defendants, jointly and severally, in the sum of $32,291.62 for loss of wages, punitive damages in an unspecified amount and attorney fees and costs.

Of the several grounds raised at the hearing and in the Complaint herein, as amended, the case was tried to the Court on only two grounds, namely, inadequate notice of the hearing and Plaintiff was dismissed by a biased tribunal. In defense the Defendants contend that the Plaintiff was afforded procedural due process as to both the notice and the hearing. It is also urged that the Defendant School District is not a "person" under 42 U.S.C. § 1983 as decided in *City of Kenosha, Wisc.* v. *Bruno*, 411 U.S. 904, 36 L. Ed. 2d 193, 93 S.Ct. 1525 (1973) and that the individual Defendant School Board members have a qualified governmental immunity from damages, *Smith* v. *Losee*, 485 F. 2d 334 (Tenth Cir. 1973).

The Court will first observe that the recent decision of the United States Supreme Court in *Wood* v. *Strickland*, —— U.S. ——, —— L.Ed. 2d ——, —— S.Ct. —— (1975) provides that 42 U.S.C. § 1983 does not extend the right to relitigate in Federal Courts evidentiary questions arising in school proceedings and was not intended to be a vehicle for Federal Court correction of errors in the exercise of school officials' discretion that do not rise to the level of violations of specific constitutional guarantees. Hence, under this case and the issues presented herein, this Court will not be concerned with reference to the wisdom or merits of the discretionary decision of a majority of the Board that Plaintiff was guilty as charged and should be dismissed. Suffice it to

say in passing that the transcript of the hearing of February 19 and 20, 1973 does reveal evidence of shortcomings of the Plaintiff which could amount to a willful neglect of duty and incompetence in the judgment and discretion of the Board.

NOTICE

Plaintiff's employment with the Defendant School District amounted to a property right. *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972). In a move to dismiss Plaintiff he was entitled to procedural due process. The meaning of procedural due process is that the party whose rights are to be affected is entitled to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972). Plaintiff was fully heard and had the assistance of counsel. But he complains that the notice of the hearing deprived him of procedural due process because the same, "contains no specifications as to what constituted incompetence or willful neglect of duty, . . .".

The notice was in the language of the statute. The hearing was to determine if the Plaintiff should be dismissed from his position as Superintendent. The reasons, grounds or charges upon which dismissal was proposed were set out in the notice. The statutory language of a charge is ordinarily sufficient to support a criminal indictment. *United States* v. *Kimball*, 441 F. 2d 505 (Tenth Cir. 1971). Hence, it should suffice to support this civil proceeding. Moreover, Plaintiff asked for no bill of particulars nor moved to make the notice more definite though he had thirteen days in which to do this, first raised the claim of inadequate notice after the start of the hearing, did not seek a continuance either before or during the hearing because of an alleged in-

adequate notice and from the transcript of the hearing it appears that Plaintiff fully realized what he had to meet at the hearing and he did meet the same with his evidence which followed that first offered. Furthermore, Plaintiff has shown no prejudice as a result of the contents of the notice of February 6, 1973. The issues appear to have been thoroughoy exhausted at the hearing and Plaintiff was heard in a meaningful time and manner. In these circumstances, and as the requirements of due process cannot be ascertained through the mechanical application of a formula, *Groppi* v. *Leslie*, 404 U.S. 496, 93 S. Ct. 582, 30 L.Ed. 2d 632 (1972), it is concluded that the notice was adequate and met the requirements of procedural due process. *Connecticut St. Dept. of Pub. W.* v. *Department of H., E. & W.*, 448 F. 2d 209 (Second Cir. 1971).

BIASED TRIBUNAL

Plaintiff's second contention is that bias and prejudice against him on the part of a majority of the members of the Board acting as a tribunal in his dismissal constituted a denial of procedural due process. He contents that the three Defendants herein through previous votes on Plaintiff's annual contracts or through public statements had committed themselves to discharge the Plaintiff.

Defendants contend and urge that the provisions of 70 Oklahoma Statutes § 6-103, *supra*, establish the procedure for the dismissal of teachers (and district superintendents) and provide that such dismissal hearings shall be before the duly elected Board of Education of an independent school district. They contend that this statutory procedure does not contain provisions for disqualification of Board members who are elected by the people for any reason and further contend that provisions for alternate members of the Board in the event of disqualification do not exist. The statute requires that

a dismissal can only be sustained by a majority vote of those constituting the duly elected Board. The record made at the hearing on February 19 and 20, 1973 discloses that Plaintiff recognized that there was no statutory procedure for requesting that Board members disqualify from participating in the dismissal hearing when he objected to the bias of the Board.

The evidence discloses that the dismissal hearing was conducted in conformance with the statutory provisions. The contention of Plaintiff that the Board was biased for the reason that it was first required to vote to propose the dismissal of Plaintiff and then conduct the hearing relating to the same is an insufficient showing of an infringement of procedural due process. There are many federal agencies who operate as investigators, chargers, prosecutors and triers. See *Kennecott Copper Corporation* v. *F.T.C.*, 467 F. 2d 67 (Tenth Cir. 1972). This case said:

> "On the first point this court pointed out in an early case, Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936), that the Federal Trade Commission combines the functions of investigator, prosecutor and judge and that Congress designed it in that manner. Thus Kenncott's complaint goes to the nature of the law itself. As to this, the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment."

Directly in point is the holding from our Circuit in *Brinkley* v. *Hassig*, 83 F. (2d) 351 (Tenth Cir. 1936) which involved a medical license revocation hearing before a State Medical Board. The Board and its membership were established by State law. There was no provision for disqualification of the statutory members of the Board. The Court said:

"From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullfied or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. In Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519, a question arose in which the members of the court had a direct personal financial interest. Adverting to this regretful circumstance, the court declined to renounce jurisdiction which appellant was entitled to invoke since 'there was no other appellate tribunal to which under the law he could go.' Cases have arisen where all the members of state Supreme Courts have been jointly sued by disappointed litigants; confronted with the choice of denying the suitor his right of appeal or hearing it themselves, the courts have heard the appeal. An exhaustive note gathering and analyzing the cases from twelve states and from England and Canada may be found in 39 A.L.R. 1476. Other authorities may be found in 42 L.R.A. (N.S.) 788, L.R.A. 1915E, p 858, and in 33 C.J. 989, and 15 R.C.L. 541. In Stahl v. Board of Sup'rs, 187 Iowa, 1342, 175 N.W. 772, 777, 11 A.L.R. 185, the court suggested that one so disqualified might resign. But the law does not require a member of a court or a tribunal to resign his position because of an isolated case where he must act although interested. The trial court, after patiently hearing the evidence as to the attitude of mind of the individual members, disposed of the contention in this language with which we are in accord:

> 'Under the general terms of the statute, the Medical Board is empowered to protect the public against conduct which is clearly against public interests and therefore necessarily unprofessional, the same as if the legislature had specifically denounced and prohibits such practice. The members of the board were not disqualified because they knew of his methods prior to the hearing and condemned them. John R. Brinkley's methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation.' "

Also see *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589 (Seventh Cir. 1945) which holds that under rule of necessity, a court or administrative agency will not be disqualified to determine fact issues before it on ground of prejudice, bias, or prejudgment of issues, where there is no statutory provision for change of venue or no other court or agency has power to act in the premises. This situation was also present in the cases of *Simard* v. *Board of Education of Town of Groton*, 473 F. 2d 988 (Second Cir. 1973) and *Swab* v. *Cedar Rapids Community School District*, 494 F. 2d 353 (Eighth Cir. 1974). In *Simard, supra*, the Court stated:

> ". . . Due process does not invariably require the procedural safeguards accorded in a criminal proceeding. Rather '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' "

In applying such concepts to school personnel situations, the Court stated further:

> ". . . While it is desirable that an administrative hearing be clothed 'not only with every element of fairness but with the very appearance of complete

> fairness,' Amos Treat & Co. v. SEC, 113 U.S.App. D.C. 100, 306 F.2d 260, 267 (1962), we would not mandate individual disqualifications in the circumstances of this case. School boards frequently negotiate with teachers in their capacity as bargaining representative. The constitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias."

In *Lopez* v. *Williams*, 372 F. Supp. 1279 (S.D. Ohio 1973) it was held in a school case that due process is satisfied if procedures are reasonably calculated to be fair and lead to reliable determinations of factual issues involved. In *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. —, 40 L.Ed. 2d 15, (1974) the United States Supreme Court said:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."

And in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 8 L. Ed. 2d 1230 (1961) the United States Supreme Court said:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

In the instant case the members of the Board elected by the people were charged by law with governing the affairs of the School District. The members of the Board were charged with employing the Superintendent who is the executive officer of the Board and who is required to perform such duties as the Board directs.[2] The Board members are thus required to have frequent dealings and direct contacts with a person in Plaintiff's former position as their Superintendent. The Board may also dismiss their Superintendent for the reasons and under the procedure set out in 70 Oklahoma Statutes § 6-103, *supra*. It would thus be impossible for a Board to consider the dismissal of a Superintendent pursuant to Oklahoma statutes without every member of the Board having some personal knowledge of the competence and activities of such person prior to the conduct of a hearing. Indeed, it might well be argued in this case that two members of the Board were biased in favor of the Plaintiff and that prior to the election of Defendant Mayes three members of the Board were biased in favor of the Plaintiff. The conduct of Defendant Mayes in making campaign statements in an election by the people to the effect that a change in the Superintendent should be made is not improper in our democratic system. The employment and dismissal of a Superintendent is a statutory duty imposed on the Board members. If the electorate feels such a change should be made, the only way such can be accomplished is through their duly elected members of the Board. The prior pronouncements of Defendant Mayes appear to support a possibility of bias against the Plaintiff, but do not support a finding of actual bias as would affect his performing his statutory duty as a Board member in the dismissal hearing of February 19 and 20, 1973. The fact that Defendants Moore and Wade had failed to support Plaintiff on prior occasions likewise do not support a finding of actual bias in this regard. It

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[2] 70 Oklahoma Statutes 1971 § 5-106.

is possible they had good cause therefor from their official relationship with the Plaintiff. All three Defendants testified that their decision to dismiss the Plaintiff was based solely on the evidence produced at the statutory hearing of February 19 and 20, 1973 and for the reasons set forth in the charges. Plaintiff was given proper and adequate notice of the hearing as heretofore determined and was given a full opportunity to cross examine witnesses against him and to present witnesses and evidence in his own behalf. He had counsel. The fact that the hearing lasted for approximately eight hours and Plaintiff presented twelve witnesses indicates Plaintiff was allowed to be fully heard. There is no complaint to the contrary. Due process is a flexible concept which must be applied as the situation demands. *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972). The situation in the instant case is that the competence of the chief executive officer of the Board had been questioned and the Board, which had the direct responsibility for the employment of its superintendent and for his dismissal in the event it was found he was not competent or had neglected his duties, was required to exercise its statutory duty. The analogy suggested by Defendants that a Board would not be able to dismiss a Superintendent actually known by the Board to have committed a felonious offense if all Board members were required to disqualify because they had knowledge of such offense would apply in the instant situation where incompetence and willful neglect of duty are involved. The Board by its very nature and responsibilities is best able to judge such matters and in the case of a Superintendent, the Board would under normal circumstances have observed or been exposed to at least some if not much of the conduct complained of.

The authorities relied on by Plaintiff are not in point with the situation at hand. They either involved criminal trials as opposed to this civil matter, or situations

where either no notice or no hearing, or both, were provided, or situations where there was provided a procedure for disqualification with a substitute judge or tribunal available. Plaintiff cites no case involving a Board charged with the hiring and firing of one of its employees and what procedural due process is required in the dismissal of such employee, except *Cooley* v. *Board of Education of Forrest City Sch. Dist.*, 453 F. 2d 282 (Eighth Cir. 1972) and in that case there was no notice given to or a hearing conducted regarding the dismissal of the teacher involved. No challenge was made therein to the Board as a tribunal. A lack of due process was premised on no notice or hearing being afforded the teacher who was summarily dismissed.

The Defendants in the trial of the instant case each testified they voted to dismiss Plaintiff based upon the evidence presented in the hearing and after reaching the conclusion from the evidence presented at the hearing that he was incompetent and willfully neglectful in the discharge of his duties. Plaintiff has failed to establish he was denied procedural due process in connection with his dismissal under a procedure and tribunal established by the Oklahoma Legislature and all the circumstances involved herein.

As the Court has determined that Plaintiff was afforded procedural due process in his dismissal both as to notice and the hearing before the statutory tribunal, it will not be necessary to treat with the other defenses raised herein by the Defendants.

Plaintiff's action herein against all Defendants should be dismissed.

Dated this 31 day of March, 1975.

/s/ Fred Daughtery
FRED DAUGHERTY
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM—October 7, 1986

Before Honorable William J. Holloway, Jr., Circuit Judge, and Honorable Wesley E. Brown, District Judge *

No. 81-1491

JON TOM STATON,
Plaintiff-Appellant,

vs.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,
Defendants-Appellees.

On consideration of appellant's petition for rehearing, and the two supplements thereto, and appellees' response to the petition for rehearing is denied.

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By PATRICK FISHER
Chief Deputy Clerk

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* Of the United States District Court for the District of Kansas, sitting by designation.